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* For changes in officers of the JOURNAL see item below, p. 631.

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 37

CONTENTS

1943

[No. 1, January, 1943, pp. 1-206; No. 2, April, 1943, pp. 207-372; No. 3, July, 1943, pp. 373-558; October, 1943, pp. 559-712.]

	PAGE
TWENTY-FIRST YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. <i>Manley O. Hudson</i>	1
THE INTER-AMERICAN JURIDICAL COMMITTEE. <i>Charles G. Fenwick</i>	6
TREATMENT OF CIVILIAN ALIEN ENEMIES. <i>Robert R. Wilson</i>	30
PLACE OF LAW AND COURTS IN INTERNATIONAL RELATIONS. <i>Edwin Borchard</i>	46
RECENT CONCEPTS AS TO THE ALIEN AND HIS PROPERTY. <i>Otto C. Sommerich</i>	58
ALIEN SEAMEN'S RIGHTS AND THE WAR. <i>Arnold W. Knauth</i>	74
WORLD ORDER—AN AGENDA FOR LAWYERS. <i>P. E. Corbett</i>	207
SETTLEMENT OF MEXICAN CLAIMS ACT OF 1942. <i>Herbert W. Briggs</i>	222
THE RECOGNITION OF LATVIA. <i>Max M. Laserson</i>	233
ITALIAN PRIZE COURTS (1866-1942). <i>Angelo Piero Sereni</i>	248
THE TREATY OF PARIS AND TURKEY'S STATUS IN INTERNATIONAL LAW. <i>Hugh McKinnon Wood</i>	262
THE SUEZ CANAL AS AN INTERNATIONAL WATERWAY. <i>Halford L. Hoskins</i>	373
THE COMING OF ECONOMIC SANCTIONS INTO AMERICAN PRACTICE. <i>Benjamin H. Williams</i>	386
COMPULSORY ADJUDICATION OF INTERNATIONAL DISPUTES. <i>Hans Kelsen</i>	397
THE LEGAL NATURE AND PUNISHMENT OF CRIMINAL ACTS OF VIOLENCE CONTRARY TO THE LAWS OF WAR. <i>George Manner</i>	407
PRINCIPLES OF INTERNATIONAL CONTROL OF NARCOTIC DRUGS. <i>Bertil A. Renborg</i>	436
JUS PACIS AC BELLI? PROLEGOMENA TO A SOCIOLOGY OF INTERNATIONAL LAW. <i>Georg Schwarzenberger</i>	460
AN APPRECIATION OF JAMES BROWN SCOTT. <i>Frederic R. Coudert</i>	559
RECENT DECISIONS IN THE BERING SEA ARBITRATION. <i>William Williams</i>	562
NEUTRALITY DECISIONS IN THE COURTS: THE SHIPS OF THE BALTIC REPUBLICS. <i>Herbert W. Briggs</i>	585
RECENT DECISIONS IN THE UNION OF INTERNATIONAL TRANSPORT BY RAIL. <i>Herbert W. Briggs and Louis B. Sohn</i>	597
THE TREATMENT OF ENEMY PROPERTY. <i>Mitchell B. Carroll</i>	611
LITERARY COMMENT:	
Retribution for war crimes. <i>George A. Finch</i>	81
Aspects of the saboteur cases. <i>Charles Cheney Hyde</i>	88
Control of aerial navigation. <i>George Grafton Wilson</i>	91
Nationalization of enemy patents. <i>Edwin Borchard</i>	92
International law and the balance of power. <i>Quincy Wright</i>	97
Eightieth birthday of the Editor-in-Chief. <i>George A. Finch</i>	275
Post-war development of international courts. <i>Arthur K. Kuhn</i>	276
Forfeiture of property in enemy occupied territories. <i>L. H. Woolsey</i>	282

	PAGE
The end of extraterritoriality in China. <i>Quincy Wright</i>	286
A fresh token of coöperation with Britain. <i>Charles Cheney Hyde</i>	289
A new technique in international reclamation. <i>Edgar Turlington</i>	291
Japanese executions of American aviators. <i>Charles Cheney Hyde</i>	480
✓ Executive agreements relating to Panama. <i>L. H. Woolsey</i>	482
✓ Status of chaplains with armed forces. <i>Robert R. Wilson</i>	490
✓ The guerrilla and the lawful combatant. <i>George Grafton Wilson</i>	494
✓ Punishment of war criminals by the United Nations. <i>Clyde Eagleton</i>	495
✓ National security and international police. <i>Quincy Wright</i>	499
Law and religion. <i>Philip Marshall Brown</i>	505
Death of Dr. James Brown Scott.....	508
Changes in officers of the Society and Journal. <i>George A. Finch</i>	631
✓ The future of international law. <i>Pitman B. Potter</i>	632
✓ Collective naturalization after conquest: non-residents. <i>Edwin Borchard</i>	634
The Turkish Institute of International Law. <i>Philip Marshall Brown</i>	640
The place of the individual in future international law. <i>Clyde Eagleton</i>	642
Inter-American collaboration in law and legislation. <i>Arthur K. Kuhn</i>	644
A neglected phase of international judicial organization. <i>Edgar Turlington</i>	648
✓ Some current questions relating to neutrality. <i>Robert R. Wilson</i>	651
CURRENT NOTES:	
Jesse Siddall Reeves. <i>William C. Dennis</i>	104
Post-War Plans of the Inter-American Bar Association. <i>W. R. Vallance</i>	106
Address of <i>Frederic R. Coudert</i>	115
✓ International law's greatest need. <i>Robert McElroy</i>	117
✓ First Inter-American Conference on Social Security. <i>C. W. Jenks</i>	120
The future of international commissions. <i>Linden A. Mander</i>	126
Annual meeting of the Society in 1943. <i>George A. Finch</i>	294
Draft resolutions of legal associations and societies.....	295
The law above nations. <i>Robert H. Jackson</i>	297
An international police force. <i>W. L. Rodgers</i>	305
The Munich "repudiation." <i>Charles Pergler</i>	308
The Department of State in wartime.....	311
Regionalism in international judicial organization. <i>C. Wilfred Jenks</i>	314
Nationality in international law. <i>W. R. Bisschop</i>	320
International validity of Nevada divorces. <i>E. de Hofmannsthal</i>	325
Notice of proposed amendments of the Society's Constitution.....	327
37th annual meeting of the Society. <i>George A. Finch</i>	509
New classes of membership in the American Society of International Law. <i>James O. Murdock</i>	657
Death of Dr. Viktor Bruns. <i>Edwin Borchard</i>	658
Work of the International and Comparative Law Section of the American Bar Association. <i>Edward W. Allen</i>	660
Inter-American Bar Association meeting. <i>William Roy Vallance</i>	666
International law meeting in England. <i>Pitman B. Potter</i>	669
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	133, 328, 513, 671
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
The Rigmor Case. Sup. Ct. Sweden.....	141
German Saboteurs' case. U. S. Sup. Ct.....	152
<i>Ex parte</i> Kumezo Kawato (U. S. Supreme Court).....	336
In the matter of Radio-Orient in Egypt (Arbitral decision).....	341

CONTENTS OF VOLUME XXXVII

V

	PAGE
United States <i>v.</i> Fullard-Leo <i>et al.</i>	520
Aguilar <i>v.</i> Standard Oil Co. of N. J.	677
<i>In re</i> Anglo-International Bank, Ltd.	686
BOOK REVIEWS AND NOTES	172, 350, 535, 694
BOOKS RECEIVED	201, 370, 555, 708
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Wilbur S. Finch.</i>	204, 372, 557, 711
INDEX	713
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

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• •

•

AMERICAN JOURNAL OF INTERNATIONAL LAW

SUPPLEMENT OF DOCUMENTS

VOL. 37	CONTENTS	1943
---------	----------	------

NUMBER 1, JANUARY, 1943

	PAGE
CHINA-GERMANY-ITALY-JAPAN. Declarations of war by China.....	1
GREAT BRITAIN-CZECHOSLOVAKIA. Exchange of notes. <i>Aug. 5, 1942</i>	2
GREAT BRITAIN-UNITED STATES. Agreement on interchange of patent rights, etc. <i>Aug. 24, 1942</i>	4
INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL. <i>Washington, D. C., June 30-July 10, 1942.</i>	
Final Act.....	9
I. Financial and commercial transactions with aggressor nations and nations dominated by them.....	14
II. Financial and commercial transactions with countries outside the Western Hemisphere.....	15
III. Transactions among the American Republics.....	16
IV. Control of movement and transfer of securities.....	16
V. Standards for the application of financial and economic controls within the American Republics.....	17
VI. Standards of effective blocking.....	17
VII. Control of business enterprises.....	18
VIII. Reciprocal coöperation among the American Republics.....	19
IX. Vote of thanks.....	20
INTER-AMERICAN JURIDICAL COMMITTEE. Reaffirmation of fundamental principles of international law. <i>Rio de Janeiro, June 2, 1942</i>	21
INTERNATIONAL TRADE IN WHEAT. <i>Washington, D. C., April 22, 1942.</i>	
Memorandum of agreement.....	24
Draft convention.....	26
Minutes of the Final Session.....	30
UNITED STATES:	
An Act to provide for the expeditious naturalization of former citizens who served or are serving with allied forces. <i>April 2, 1942</i>	41
Foreign Agents Registration Act. <i>April 29, 1942</i>	42
Proclamation regarding Alien Enemies. <i>Jan. 14, 1942</i>	54

NUMBER 2, APRIL, 1943

CHINA-GREAT BRITAIN. Treaty for relinquishment of extraterritorial rights. <i>Jan.</i> <i>11, 1943</i>	57
Exchange of notes.....	62
Agreed minute.....	65
CHINA-UNITED STATES. Treaty for relinquishment of extraterritorial rights. <i>Jan.</i> <i>11, 1943</i>	65
Exchange of notes.....	69
GREAT BRITAIN-UNITED STATES. Agreement regarding problems of marine transpor- tation and litigation. <i>Dec. 4, 1942</i>	71
Exchange of notes.....	74

	PAGE
INTER-AMERICAN CONFERENCE OF POLICE AND JUDICIAL AUTHORITIES. <i>May 27-June 9, 1942.</i> Final Act.	75
I. Resolution relative to propaganda by public demonstrations.	77
II. Resolution relative to propaganda in educational institutions.	78
III. Recommendation relative to associations.	78
IV. Resolution relative to fishing vessels.	79
V. Recommendation on subversive activities and special police unit.	79
VI. Recommendation relative to uniform penal law.	81
VII. Recommendation relative to fraudulent citizenship.	81
VIII. Resolution concerning the granting of citizenship.	81
IX. Recommendation relative to Treaty on Criminal Law of 1940.	82
X. Recommendation on extradition.	82
XI. Resolution on draft convention relative to expulsion of aliens.	82
XII. Resolution on special travel documents.	82
XIII. Resolution relative to Inter-American Police Union.	83
XIV. Recommendation on national inter-departmental committees.	84
LIBERIA-UNITED STATES. Defense agreement. <i>March 31, 1942.</i>	85
MEXICO-UNITED STATES. Exchange of notes regarding military service. <i>Jan. 22, 1943.</i>	89
UNITED STATES:	
Act to facilitate disposition of prizes. <i>Aug. 18, 1942.</i>	90
Proclamation concerning capture of prizes. <i>Jan. 30, 1943.</i>	92
Neutrality Act of 1939. Joint resolution amending Sec. 7.	93

NUMBER 3, JULY, 1943

TREATIES ON PRIVATE INTERNATIONAL LAW (MONTEVIDEO):	
Introduction. <i>J. Irizarry y Puente.</i>	95
Political Asylum and Refuge. <i>Aug. 4, 1939.</i>	99
Intellectual Property. <i>Aug. 4, 1939.</i>	103
Exercise of Liberal Professions. <i>Aug. 4, 1939.</i>	107
International Commercial Navigation Law. <i>Mar. 19, 1940.</i>	109
International Procedural Law. <i>Mar. 19, 1940.</i>	116
International Penal Law. <i>Mar. 19, 1940.</i>	122
International Commercial Terrestrial Law. <i>Mar. 19, 1940.</i>	132
International Civil Law. <i>Mar. 19, 1940.</i>	141
Additional Protocol.	151
Trade-Marks. <i>Jan. 16, 1889.</i>	152
Patents of Invention. <i>Jan. 16, 1889.</i>	155

NUMBER 4, OCTOBER, 1943

UNITED NATIONS CONFERENCE ON FOOD AND AGRICULTURE. Text of the Final Act. <i>June 3, 1943.</i>	159
AMERICAN MEXICAN CLAIMS COMMISSION. Regulations relating to claims before the Commission. <i>May 18, 1943.</i>	192

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 37

January, 1943

NO

CONTENTS

PA

TWENTY-FIRST YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE. <i>Munley O. Hudson</i>	
THE INTER-AMERICAN JURIDICAL COMMITTEE. <i>Charles G. Fenwick</i>	
TREATMENT OF CIVILIAN ALIEN ENEMIES. <i>Robert R. Wilson</i>	11
PLACE OF LAW AND COURTS IN INTERNATIONAL RELATIONS. <i>Edwin Borchard</i>	
RECENT CONCEPTS AS TO THE ALIEN AND HIS PROPERTY. <i>Otto C. Sommerich</i>	
ALIEN SEAMEN'S RIGHTS AND THE WAR. <i>Arnold W. Knauth</i>	
EDITORIAL COMMENT:	
Retribution for war crimes. <i>George A. Finch</i>	5
Aspects of the Saboteur cases. <i>Charles Cheney Hyde</i>	6
Control of aerial navigation. <i>George Grafton Wilson</i>	7
Nationalization of enemy patents. <i>Edwin Borchard</i>	8
International law and the balance of power. <i>Quincy Wright</i>	9
CURRENT NOTES:	
Jesse Siddall Reeves. <i>William C. Dennis</i>	10
Post-War Plans of the Inter-American Bar Association. <i>W. R. Vallance</i>	10
— Address of Frederic R. Coudert	11
International law's greatest need. <i>Robert McElroy</i>	11
First Inter-American Conference on Social Security. <i>C. W. Jenks</i>	12
The future of international commissions. <i>Linden A. Mander</i>	12
CHRONICLE OF INTERNATIONAL EVENTS. <i>Dorothy R. Dart</i>	13
JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW:	
The Rigmor Case. Sup. Ct. Sweden.....	14
German Saboteurs' case. U. S. Sup. Ct.	15
BOOK REVIEWS AND NOTES:	
Roosevelt, <i>Public Papers and Addresses</i> , 172; Wright, <i>Study of War</i> , 174; Miller, <i>Treaties and other International Acts of United States</i> , 177; Atwater, <i>American Regulation of Arms Exports</i> , 178; United States, <i>Papers Relating to Foreign Relations</i> , 178; Hollander, <i>Confiscation, Aggression, and Foreign-Funds Control</i> , 179; Feilchenfeld, <i>International Economic Law of Belligerent Occupation</i> , 181; Bonnet, <i>United Nations on the Way</i> , 181; Ranshofen-Wertheimer, <i>Victory Is Not Enough</i> , 182; Doman, <i>Coming Age of World Control</i> , 183; Leonhardt, <i>Nazi Conquest of Danzig</i> , 184; Mattern, <i>Geopolitik</i> , 186; Brookings Institution, <i>Refugee Settlement in Dominican Republic</i> , 187; Fried, <i>Guilt of the German Army</i> , 188; <i>Institute on World Organization</i> , 189; Mills, <i>British Rule in Eastern Asia</i> , 190; Callcott, <i>Caribbean Policy of United States</i> , 191; Inman, <i>Latin America</i> , 192.	
Briefer notices: Maritain, 193; Sánchez, 193; De Félice, 193; Pink, 194; Montagu, 194; Hornbeck, 195; Langford, 195; Hanna, 196; Miller, 196; Christian, 197; Cole, 197; Hanč, 198; <i>Impact of War on America</i> , 198; <i>Economic Problems of War</i> , 199; Tinley, 199; International Labor Office, 200; McConagha, 201.	
Books received	201
PERIODICAL LITERATURE OF INTERNATIONAL LAW. <i>Wilbur S. Finch</i>	201
SUPPLEMENT SECTION OF DOCUMENTS. (Separately paged and indexed.)	

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THE TWENTY-FIRST YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE*

By MANLEY O. HUDSON

The current international situation did not permit the Permanent Court of International Justice to resume its activities during the year 1942. Two cases are still pending before the court—the case relating to the Electricity Company of Sofia and Bulgaria and the Gerliczy Case—but no action was taken by the parties in either of them during the year. Nor was there the usual activity in connection with instruments relating to the court.

Two of the judges of the court resigned during the year.¹ By a letter addressed to the President of the court on November 17, 1941, Judge Urrutia (Colombia) tendered his resignation to take effect on January 1, 1942, stating that "owing to my advanced age and the unsatisfactory state of my health, I can no longer regard as possible any future participation in the activities of the court;" the letter was transmitted by the Registrar to the Acting Secretary-General of the League of Nations on January 9, 1942, and under Article 13 of the amended Statute the resignation took effect on this latter date. Judge Nagaoka (Japan) tendered his resignation by an undated letter addressed to the President, transmitted by the Registrar to the Acting Secretary-General of the League of Nations on January 15, 1942.

These resignations leave the court with twelve judges, eight of whom were elected in 1930, two in 1936, one in 1937, and one in 1938. The normal nine-year terms of the judges expired on December 31, 1939, but as their successors have not been elected, they "continue to discharge their duties until their places have been filled," as provided in Article 13 of the court's Statute; when the third general election of judges was postponed by the Twentieth Assembly of the League of Nations on December 11, 1939, it was stated that "according to the Statute of the Court (Article 13, paragraph 3), the present judges continue to discharge their duties if their places have not been filled."² Under a decision taken by the court on November 30, 1939, the provision in Article 13 of the Statute is applied by analogy to the officers of the court. The President, J. Gustavo Guerrero (El Salvador), and the Registrar, J. López Oliván, continue to discharge their duties from Geneva. The present personnel of the court may suffice to constitute a

* This is the twenty-first in the writer's series of annual articles on the organization and work of the Permanent Court of International Justice, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ League of Nations Document, C. 17. M. 17. 1942. V.

² Records of Twentieth Assembly, Plenary, p. 6. The action of the Assembly had been forecast in the British House of Commons on Nov. 21, 1939. 353 House of Commons Debates (1939), c. 1179, 1184.

quorum of the full court, for which only nine judges are required; for a meeting of the Chamber of Summary Procedure, which can adjudicate in the name of the court, the presence of only five judges is required and two of them may be judges *ad hoc*.

The budget of the court for 1943 was voted by the Supervisory Commission of the League of Nations at its meeting in Montreal, August 25-26, 1942. As only nominal sums are paid to the judges in lieu of the suspended salaries, the budget is much reduced; for each of the years 1942 and 1943, it amounts to about 300,000 florins (\$165,000), the actual expenditure being less than two-thirds of that amount. One of the chief items of the budget provides for the pensions payable to former judges.

Numerous instruments relating to the court, both multipartite and bipartite, continue in force despite the war. The Geneva General Act of 1928 is still in force for some twenty States. The declarations made by some thirty States under paragraph 2 of Article 36 of the Statute, relating to the court's compulsory jurisdiction, continue in force, also; but the declarations of France and Rumania expiring in 1941 and those of Monaco and Peru expiring in 1942 have not been renewed. Moreover, some bipartite treaties of quite recent date confer jurisdiction on the court. Of special interest is the treaty between Colombia and Venezuela of December 17, 1939, brought into force on September 12, 1941,³ and the treaty between Brazil and Venezuela of March 30, 1940, brought into force on January 9, 1941,⁴ each of which confers on the court extensive compulsory jurisdiction.⁵

Aside from the formal instruments relating to the court, interest continues to be manifested in its future. In an address on July 23, 1942, the Secretary of State of the United States declared that "settlement of disputes by peaceful means, and indeed all processes of international coöperation, presuppose respect for law and obligations. It is plain that one of the institutions which must be established and be given vitality is an international court of justice."⁶ This declaration led the British Secretary of State for Foreign Affairs to make the following statement to the House of Commons on July 29, 1942: "His Majesty's Government are entirely in favor of the establishment, or reestablishment, after the war of an international court of justice, and have noted with much interest the references to this subject made by Mr. Cordell Hull in the course of his speech on July 23rd. . . ."⁷

At the third meeting of the Ministers of Foreign Affairs of the American Republics, held in Rio de Janeiro, January 15-28, 1942, the Inter-American Juridical Committee was charged to formulate "specific recommendations relative to the international organization in the juridical and political fields."

³ 69 *Gaceta Oficial de Venezuela* (1941), pp. 133, 822-825.

⁴ *Idem*, pp. 130, 968.

⁵ Apparently, these treaties have not been registered at Geneva.

⁶ 7 Department of State Bulletin (1942), p. 645.

⁷ The Times (London), July 30, 1942, p. 8.

In exercise of this mandate, on September 5, 1942, the Inter-American Juridical Committee made a "preliminary recommendation on post-war problems," which has been transmitted to the Governments of the American Republics by direction of the Governing Board of the Pan American Union.⁸ The recommendation includes the following significant reference to the court:

The jurisdiction of the Permanent Court of International Justice should be extended, and procedure before the Court should be coördinated with that of regional judicial tribunals, if any should be created; the jurisdiction of these regional tribunals being determined by the place and the subject-matter of the controversy.

The future of the court is commanding attention in non-official circles also. On August 27, 1942, the House of Delegates of the American Bar Association adopted the following resolution on the proposal of the Association's Section on International and Comparative Law:⁹

Whereas, in the ensuing years and at this time it has become apparent that the United States must play a responsible part in the establishment and operation of international institutions designed to promote the principles of international democracy and the common welfare of mankind, and

Whereas, the civilized world should build upon the experience acquired in the operation of such institutions as the League of Nations, the International Labor Organization and the Permanent Court of International Justice and the Pan American Union, and should preserve the achievements of those organizations while correcting their deficiencies,

Be it resolved, That the American Bar Association reaffirms its confident belief in the necessity and practicability of international tribunals which will apply and develop international law; asserts the desirability of the United States at the earliest opportune time declaring its confidence in this principle and in the only permanent court which the ingenuity of man has hitherto devised, namely, the Permanent Court of International Justice, which even today could be utilized by the United States; and endorses the view that means should be devised to establish and maintain in the post-war world an adequate international judicial system to the end that the rule of law may be established among as within nations, and it asserts the desirability of the coöperation of the United States in the establishment of such a system.

For the past three years the publications of the court have been drastically curtailed, but a fourth edition of Series D, No. 1, was recently published, containing the Statute, Rules of Court, and other constitutional documents; and Volume 88 of Series C is in course of publication.

⁸ The text of the recommendation was published by the Pan American Union in November, 1942.

⁹ 28 American Bar Association Journal (1942), p. 716. See also, this JOURNAL, Vol. 14 (1942), pp. 683-684. Resolutions had previously been adopted by the American Bar Association, in 1922, 1923, 1929, 1931, and 1934. See Hudson, *In re the World Court* (1934), pp. 15-16.

Since the establishment of the court in 1920, its work has been facilitated and the understanding of its functions has been greatly extended by the publication of the texts of treaties by the Secretariat of the League of Nations. The publication in 1942 of the two-hundredth volume of the League of Nations Treaty Series, bringing the number of published instruments up to 4700, was a notable event. While the series contains only the texts of treaties or engagements registered with the Secretariat, the number of such texts is so large that it serves as a most useful compendium of the world's treaty law, and thus realizes a dream of the Institute of International Law sixty years ago.¹⁰ The continuance of this activity in the future would seem to be essential not only as a desideratum of the development of international law, but also as an aid to the functioning of the Permanent Court of International Justice.¹¹

¹⁰ Meeting at Munich in 1883, the Institute of International Law appointed a committee to study the question of "a more universal, prompt and uniform publication" of treaty texts, and at Brussels in 1885 it adopted a *vœu* that the publication "be made as general and complete as possible," in order that the texts might "furnish the science of international law with perfect and exact knowledge as to the legal relations" of States. It later envisaged the formation of an official international union for this purpose, but a diplomatic conference held at Berne in 1894 at which eighteen States were represented failed to arrive at any positive result. See Hudson, "The Registration and Publication of Treaties," this JOURNAL, Vol. 19 (1925), pp. 273-292.

¹¹ Down to May 1, 1942, 4811 principal instruments had been registered at Geneva. The publication of the monthly brochure entitled *Registration of Treaties* is being continued, No. 242 having recently appeared.

On Jan. 28, 1931, sixty teachers of international law and international relations in American universities urged the Department of State to inaugurate the practice of registering the treaties of the United States at Geneva. See Proceedings of the American Society of International Law, 1931, pp. 250-253. An arrangement to this end was concluded under Secretary Hull's direction in January 1934. U. S. Executive Agreement Series, No. 70; this JOURNAL, Vol. 28 (1934), pp. 342-345. Since that date American treaties have regularly been communicated to the Secretary-General of the League of Nations for registration; of the 54 treaties registered during the year 1941, 34 were communicated by the United States.

Procedure with respect to treaties of the United States was regularized by Departmental Order, No. 1078, of August 6, 1942, as follows: "The Chief Clerk and Administrative Assistant is authorized and directed to certify, without seal, for and in the name of the Secretary of State or the Acting Secretary of State, a copy of each treaty or convention proclaimed by the President on or after January 23, 1934, and likewise a copy of every other international agreement entered into by the United States with a foreign country on or after January 23, 1934, which when so certified will be forwarded by the Department to the American Minister at Bern for transmission by him to the Secretary General of the League of Nations for registration by the Secretariat of the League and publication in the League of Nations Treaty Series." 7 Department of State Bulletin (1942), p. 692.

THE INTER-AMERICAN JURIDICAL COMMITTEE

BY CHARLES G. FENWICK

Of the Board of Editors; Member of the Committee

Even before the attack upon the United States by Japan at Pearl Harbor and the subsequent declarations of war by Germany and Italy, the Inter-American Neutrality Committee had already been forced into a position where it could not fulfill the purposes for which it was originally intended. At the time of its creation by the meeting of Foreign Ministers at Panama in 1939, the Committee represented a genuine desire on the part of the American Republics to observe "certain standards" of neutral conduct which would insure their being able to maintain their status as neutral States; and in fulfillment of the functions assigned to it, the Committee proceeded to make "recommendations" which it believed to be in accord with the traditional principles of neutrality.¹ The recommendation on the Security Zone, while upholding a departure by the American Republics from the specific rules of neutrality, was justified by the Committee on the basis of the fundamental right of self-defense under the conditions of modern submarine warfare.

But the situation changed more rapidly than could have been anticipated. The violation by Germany of the rights of its neutral neighbors, followed by the defeat of France, made it clear to the United States that strict neutrality was no longer consistent with its own national security; and, by progressive steps, measures were taken which could not be justified by the standards recognized at Panama.² In consequence, the last phase of the Neutrality Committee's work, the elaboration of a code of neutrality in accordance with the resolution of the meeting of Foreign Ministers at Habana, took on of necessity an academic character, the Committee being well aware that its recommendations on many points could have no relation to the war in progress. The end was at hand when the act of aggression on the part of Japan brought into effect the Habana Declaration of reciprocal assistance and co-operative defense.

The program of the Third Meeting of Ministers of Foreign Affairs made provision, under the title "Protection of the Western Hemisphere," for "the

¹ See "The Inter-American Neutrality Committee," this JOURNAL, Vol. 35 (1941), p. 12.

² Even if, from the point of view of domestic law, the transfer of the fifty destroyers by the United States to Great Britain in September, 1940, was legal, it is clear that the transfer was in contravention of the ordinary rules of neutrality contemplated at the time of the Panama meeting. The provisions of the Lend-Lease Act of March, 1941, were even more contrary to the standards of the Panama resolution. There was more than enough justification in both cases for the departure from strict neutrality; but that issue was not before the Neutrality Committee.

consideration of measures which might be undertaken by the American Republics now for the development of certain common objectives and plans which would contribute to the reconstruction of world order."³ Among the headings included under this broad title was the "Juridical Organization of the Continent—Inter-American Neutrality Committee." The subcommittee of the meeting, to which this problem was entrusted, had before it a number of projects submitted by different delegations in respect to the organization of the Committee. The project presented by the United States delegation proposed the creation of an "Inter-American Committee on Juridical and Post-War Problems," to be composed of 21 members, one to be named by each of the American Governments. The increase in membership over that of the former Neutrality Committee was intended to meet the desires of a number of the Governments for representation on the new committee, whose functions were to be no longer strictly technical in character.⁴ A project presented by the Peruvian delegation raised the number of members of the old Neutrality Committee from seven to twelve, without, however, specifying how the twelve were to be designated. Projects presented by Ecuador and Uruguay proposed that the existing membership of the Neutrality Committee be retained, and that the reorganization should merely take the form of a change of functions. The position taken by these two countries prevailed in the subcommittee of the meeting which had the subject under consideration, the argument being that the composition of the Neutrality Committee had shown the advantages of a strictly technical committee sufficiently small in number to be able to work effectively. In the resolution adopted by the Rio meeting⁵ it is provided that "the Inter-American Neutrality Committee at present existing⁶ will continue to func-

³ For the text of the program, see Third Meeting of the Ministers of Foreign Affairs of the American Republics: Program and Regulations, Pan American Union, 1941. For a survey of the organization and activities of the meeting, see C. G. Fenwick, "The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro," this JOURNAL, Vol. 36 (1942), p. 169.

⁴ An interesting feature of the project (No. 25) presented by the United States delegation was that the Committee, in addition to having a broad jurisdiction with respect to "problems having an international and juridical aspect arising in connection with the existing war of general interest to the American Republics," was also authorized to "give advisory opinions on matters of difference between two or more American Republics, if so requested by the interested Governments."

⁵ For the text of the resolution, No. XXVI of the Final Act, see Report on the Third Meeting of the Ministers of Foreign Affairs of the American Republics, Pan American Union, Congress and Conference Series, No. 36; this JOURNAL, Supp., Vol. 36 (1942), p. 86.

⁶ At the time of its transformation into the new Juridical Committee the Inter-American Neutrality Committee consisted of the following members: Afranio de Mello Franco of Brazil, Chairman; Eduardo Labougle of Argentina, substituting for Luis A. Podestá Costa; Mariano Fontecilla of Chile; Charles G. Fenwick of the United States; Fernando Lagarde y Vigil of Mexico; Carlos Eduardo Stolk of Venezuela; and Manuel Francisco Jimenez Ortiz of Costa Rica. The legal continuity of the two committees was stressed by the Chairman of the Juridical Committee at its opening session, and the customary formalities attending such opening sessions were deliberately avoided.

tion in its present form under the name of 'Inter-American Juridical Committee,' will have its seat at Rio de Janeiro and may meet temporarily, if it deems it necessary, in other American capitals."

Minor changes in the organization of the new Juridical Committee were made in accordance with the experience of the Neutrality Committee. It was provided not only that the members of the Committee should be jurists, but that they should have "no other duties than those pertaining to the Committee." This provision was directed against the appointment by several Governments of their diplomatic representatives in Rio as members of the Committee—a practice which, in spite of the ability of the persons appointed, appeared to the Foreign Ministers to be incompatible with the character of the Committee as a juridical agency representing the twenty-one American States as a whole.⁷ On the other hand, the technical character of the new Juridical Committee was greatly enhanced by a provision in Resolution XXVI authorizing the Committee to invite "American jurists, whom they consider to be specialists on specific subjects, to take part in their deliberations on special juridical matters." This provision, inoperative at present writing for lack of an adequate budget, will have the great advantage of permitting the Committee to increase its membership from time to time.⁸ The Committee was also authorized, in exceptional cases, to have recourse to the aid of technical experts whose services it might consider indispensable for the most efficient performance of its duties.⁹

⁷ It was definitely understood that the members of the Neutrality Committee, although designated by the governments of which they were nationals, were not representatives or delegates of their several countries but of the inter-American community. But this technical position was difficult to maintain when the member happened to be as close to the Foreign Office as an ambassador or a counsellor of legation must of necessity be.

Three of the members of the Neutrality Committee, two of them being respectively the resident ambassadors of Argentina and Chile and the third being counsellor of the Mexican Embassy, were unable to continue as members of the Juridical Committee. The Mexican Government promptly appointed Pablo Campos Ortiz to succeed Fernando Lagarde, and the Chilean Government appointed Felix Nieto del Rio to succeed Ambassador Fontecilla. The Argentine member, Luis A. Podestá Costa, for whom Ambassador Labougle had been substituting, has not as yet taken part in the work of the Committee. The Costa Rican member, Sr. Jimenez, who had found it impossible to be in permanent residence at Rio de Janeiro, felt it proper under the circumstances to decline appointment to the Juridical Committee (See *Ata da 12a Sessão*). The post remains unfilled at present writing. Dr. Mello Franco, who had been Chairman of the Neutrality Committee, was elected Chairman of the Juridical Committee, while Dr. Chermont continued as its Executive Secretary. (The death of Dr. Mello Franco on Jan. 1 deprives the Committee of the leadership of one of America's greatest jurists.)

⁸ It is possible that by means of this provision the Committee may be able to avail itself of the counsel of distinguished jurists who could not, even if designated members of the Committee, arrange to reside permanently outside their countries.

⁹ In the case of the technical experts employed by the Committee, provision is made that their salaries will be met by the American States through the intermediary of the Pan American Union. By a liberal interpretation of the resolution this provision might also be held to apply to the jurists invited to take part in the deliberations of the Committee.

The Secretariat of the Committee is maintained by the Brazilian Government, which has shown exemplary generosity both in bearing the general expenses of the Secretariat¹⁰ and in assigning to the Committee the use of one of the most beautiful buildings in the city. The offices of the Committee members and of the clerical staff are located in the palacio formerly occupied by the Consêlho Municipal, a spacious structure of Renaissance design fronting on the Praça Floriano and facing, across the Avenida Rio Branco, the imposing Biblioteca Nacional. Every facility has been given to the members of the Committee by the Brazilian Government for the performance of their functions. By the courtesy of Brazil's distinguished Foreign Minister, Sr. Aranha, the library of the Foreign Office, located in the Palácio Itamaraty, has been placed at the disposal of the Committee; while other libraries have indicated their willingness to grant special privileges to it. If it was a mere act of succession that made Rio de Janeiro the seat of the Juridical Committee as well as of the Neutrality Committee, the members of the Committee do not fail to appreciate the privilege of living and working in the presence of the most spectacularly beautiful harbor in the world.

The functions assigned to the new Juridical Committee are of the widest variety. Resolution XXVI, dealing with the organization of the Committee, enumerates a number of functions, both general and specific, while other functions are assigned by separate resolutions. For convenience, the problems upon which the Committee is called to make recommendations may be classified under four heads: (1) juridical problems arising out of the present war; (2) post-war problems; (3) the development and coördination of the work of the codification of international law; and (4) the coördination of the resolutions of consultative meetings of Foreign Ministers. Under these various headings are included both theoretical and practical problems, technical issues of law, questions of organization and administration, and recommendations involving political judgment and moral idealism. That functions so diverse should be assigned to the Committee is an indication that the Rio meeting of Foreign Ministers realized the need of a permanent

¹⁰ The voluntary assumption by the Government of Brazil of the expenses of the Secretariat of the Neutrality Committee was influenced naturally by the fact that the Governing Board of the Pan American Union selected Rio de Janeiro as the seat of the Committee. It is a question whether, in view of the heavier expenses of the Juridical Committee, it would not be more equitable to distribute the burden among all of the American Republics. In the project (No. 25) on "The Inter-American Committee on Juridical and Post-War Problems" presented to the Rio meeting of Foreign Ministers by the United States delegation it was proposed that the members of the Committee should be paid by the governments of the countries whose nationals they were (as was the case with the members of the Neutrality Committee), and that the Committee should make to the Governing Board of the Pan American Union "a recommendation covering an annual budget of other expenses to be met by the Governments of the American Republics." The Governing Board was then to pass upon the budget and submit to the American Republics a specific proposal for the financing of the Committee. Had this provision been adopted, the expenses of the Committee would have been borne by all of the American Republics in the usual quotas.

technical body not only to meet issues of the moment, as in the case of the Neutrality Committee, but to undertake the necessary preparatory work for the decisions of subsequent meetings and conferences. Even within its more restricted functions the Neutrality Committee had proved to be a convenient agency for drafting agreements and for making preliminary reports on subjects which could not be decided during the brief period of a consultative meeting.¹¹ The Juridical Committee, given its broad general jurisdiction, could naturally be assigned a wider range of special studies.

In respect to the category of juridical problems arising out of the present war, the Committee is called upon to undertake the study of such problems as may arise in the course of "experience and the development of events." Here the Committee may act of its own initiative, using its judgment as to the character of the problems to be studied and submitting recommendations to the American Governments through the Pan American Union, or directly when necessary. In addition to this general jurisdiction, the Committee is called upon to continue the studies on contraband of war and on the draft code of the principles and rules of neutrality in the preparation of which the Neutrality Committee had been engaged at the time of its dissolution. It is also called upon to report upon two distinct sets of claims cases: those arising from the requisition or use of merchant vessels and those arising from illegal acts of the belligerents. The requisition or use by the individual American Republics of merchant vessels may embrace those immobilized in their ports "or those under the flag of a non-American enemy, or belonging to States whose territories are occupied by a non-American enemy." The second group of claims embraces those brought "by any American Republic against a non-American enemy State for unlawful acts committed to the detriment of such Republic, its nationals or their property." Lastly, among the problems arising out of the war may be listed the Bolivian project calling for an affirmation of the traditional theory of law in the presence of the aggression of the Axis Powers.

The jurisdiction given to the Committee in respect to post-war problems came as the result of a separate resolution of the Rio meeting, pointing out the connection between the legal, political and economic conditions of a "new order of peace" and entrusting to the Inter-American Financial and Economic Advisory Committee and to a special Inter-American Technical Economic Conference the study of the economic problems of reconstruction, and to the Inter-American Juridical Committee "the formulation of specific

¹¹ The Neutrality Committee had been in existence only six months when the Habana meeting assigned to it the task of preparing a preliminary draft of a convention for the more effective enforcement of the Security Zone. The meeting also requested the opinion of the Committee regarding the project presented by the delegation of Uruguay concerning the extension of territorial waters. See resolutions I and VIII of the meeting, this JOURNAL, Supp., Vol. 35 (1941), pp. 5, 12.

recommendations relative to the international organization in the juridical and political fields, and in the field of international security." ¹²

Distinct from functions connected with the war and with reconstruction after the war are the functions connected with the codification of international law and those connected with the coördination of the resolutions and declarations of consultative meetings of Foreign Ministers. The former were specifically assigned to the Committee in the resolution which created it. The latter were entrusted in a separate resolution based upon a project introduced by El Salvador, recommending that the Governing Board of the Pan American Union should always include in the agenda of future meetings of the Ministers of Foreign Affairs the topic, "Coördination of the resolutions, declarations and other acts of previous meetings of the Ministers of Foreign Affairs." The resolution adopted by the Rio meeting incorporated the project of El Salvador, adding the further recommendation that the Inter-American Juridical Committee should study the subject and transmit its conclusions to subsequent meetings of Foreign Ministers through the Pan American Union. ¹³

The opening sessions of the Committee were devoted to the organization of the work before it and the determination of the particular problems to which it would be most expedient to direct its first recommendations. It was agreed to follow the precedent established by the Neutrality Committee of discussing in full committee the general principles of the problem upon which a recommendation was to be made. A subcommittee would then be appointed to prepare a preliminary draft of a recommendation, and upon the basis of this preliminary draft the Committee as a whole could come to a decision. This would enable the Committee to distribute the work among its members and to study simultaneously a number of problems. Individual members of the Committee were free to introduce at any time projects bearing upon studies that might be undertaken by the Committee; and, at the same time, the subcommittees were free to call individual members into consultation. Meetings could also be held in a "committee of the whole," which would permit more informal discussions than would be possible at regular sessions of the full Committee. ¹⁴

Having laid down the general lines upon which it proposed to handle the

¹² For the text of the resolution, No. XXV of the Final Act, see Report, p. 52, and this JOURNAL, Supp., Vol. 36 (1942), p. 85.

¹³ For the text of the resolution, No. XXVII of the Final Act, see Report, p. 54, and this JOURNAL, Supp., *ibid.*, p. 87.

¹⁴ As might be expected, most of the work of the Committee is done in subcommittees. As a general rule the Committee holds only one formal session a week. The minutes of this session are stenographically reported and later abridged somewhat and forwarded to the Pan American Union for distribution to the governments. See Minutes of the Inter-American Juridical Committee, March 20-July 3, 1942, Pan American Union, September 1942. Spanish and Portuguese are used alternatively in the discussions, but the minutes are drawn up in Portuguese only.

wide variety of problems before it, the Committee decided to make its first recommendation upon the project introduced by the Bolivian delegation at the Rio meeting of Foreign Ministers and referred to the Committee by Resolution XXVIII of the Final Act.¹⁵ The Bolivian project, entitled "Affirmation of the traditional theory of law in the presence of a deliberate repudiation of international justice and morality," began with a preamble reciting the false and dangerous character of the principles in which the world crisis had its origin and the necessity of maintaining the authority of international law against the excesses of materialism and nationalism. This was followed by a proposed declaration to be made by the American Republics, to the effect that "since the idea of justice is the doctrinal basis of all international action and since the submission of the State to rules of law is the ultimate stage of human perfection, they reaffirm their faith in traditional international law and condemn conquest."¹⁶

The Committee interpreted the reference of the project to it by the meeting of Foreign Ministers as an indication of a desire that the Committee should attempt to draft a reaffirmation of fundamental principles of international law. Simple as the task might seem to be, inasmuch as the recommendation proposed to set forth principles already accepted by the American Republics, lengthy discussions took place among the members of the Committee before a final text could be agreed upon.^{16a} Doubtless a mere reaffirmation of principles in the exact form in which these appeared in various inter-American documents might have been drafted with little delay. But the Committee believed that it was desirable to rephrase certain principles so as to give them more precise definition and make clearer their application to the conditions of the present day. Thus Article I, dealing with the supremacy of law over the will of the individual State and with the moral basis of international obligations, drew upon three distinct inter-American documents: the Lima Declaration of American Principles, the Panama Resolution on Maintenance of International Activities in Accordance with Christian Morality, and the Habana Declaration on Maintenance of Peace and Union among the American Republics. The actual phrasing of Article I, however, is an independent restatement of what the Committee believed to be either the substance of the three documents or inferences that could logically be drawn from them. Thus the principle that "No distinction is recognized between the moral law as applied to individual citizens and to nations" and the principle that "there is but one single standard of conduct

¹⁵ For the text of the resolution, see Report, p. 55, and this JOURNAL, Supp., *ibid.*, p. 88.

¹⁶ In spite of the intrinsic merit of many of the projects presented by the delegations to a consultative meeting of Foreign Ministers, they are not printed in the *Diario* of the meeting, due, possibly, to the large number of them presented. The *Diario* of the Rio meeting lists 81 projects in all. See "The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro," this JOURNAL, Vol. 36 (1942), p. 173.

^{16a} The text is printed in full in Supplement to this JOURNAL, p. 21.

between nation and nation and between man and man" are clearly implied in the Resolution on Maintenance of International Activities in Accordance with Christian Morality.¹⁷ In making the assertion that the general standards of international conduct are "derived from the moral law which is the inheritance of Christian states," the Committee was aware of the difficulty of reducing the moral law to specific terms and of the fact that there are wide variations in the standards of conduct believed by individual persons to be moral. Nevertheless, the Committee was of the opinion that the conception of the moral law as a basis of human conduct, taken in the light of the inheritance of the Christian states which formed the international community at the middle of the nineteenth century, offered a recognizable standard of conduct when fundamental principles of international law were at issue.¹⁸

Article III of the Reaffirmation, in asserting the juridical equality of States, lays down the rule that "no State may be held bound by changes in the rules of law, whether in political or in economic matters, to which it has not freely consented." The rule clearly relates to the modern practice of adopting new rules of law by means of multilateral treaties; and it gives expression to that aspect of equality which has most significance for the American Republics. The criticism may be made that it appears to give a static character to international law by suggesting that the consent of every member of the community is required for the adoption of new rules of law. But the conclusion is not justifiable in the light of international experience. A group of the leading States may, in the future as in the past, agree among themselves upon new rules of law; and assuming that the rules are progressive, it is to be expected that other States will in time come to accept them. But until they do accept them, they are not bound by them. The time may come when majorities will be able to impose their will upon minorities. But as yet the "traditional theory of law," which the Committee was called upon to formulate, recognizes the necessity of individual consent to new rules of law.¹⁹

Article IV, dealing with the principle of good faith in the observance of treaty obligations, raised the question whether any inter-American document

¹⁷ The subcommittee which prepared the final draft of the Reaffirmation explained the sources from which the principles were drawn in the following terms:

"The principles set forth have already been incorporated into American conventional law or are the object of resolutions and declarations approved at inter-American conferences or consultative meetings. But at the same time the draft declaration includes certain principles which, if not the subject of provisions of the written law, are in fact part of the juridical inheritance (*patrimonio*) of America and have been implicitly accepted by all the States of this hemisphere." (See Minutes of the Inter-American Juridical Committee, p. 31.)

¹⁸ The same position was taken in connection with the assertion of the priority of the moral law made in Article I of the "Conclusions" of the Preliminary Recommendation on Post-War Problems. See text, below, p. 20.

¹⁹ It would seem improbable that, in view of the extended use of written agreements in recent years, usage and custom will constitute in the future a source of international law. But assuming the contrary, it would nevertheless be necessary that all states should at least give implied consent to the validity of the rule introduced by custom.

could be found to justify the revision of treaties which are no longer in accord with changes of circumstances. One of the members of the Committee argued in favor of a frank statement of the right of the American States as a body to apply the procedure of consultation when revision could not be obtained by negotiation between the parties.²⁰ Secretary Hull's letter of July 16, 1937, was quoted as justification for the right of a State to request revision and for the obligation of the whole community to put in motion the procedure of revision.²¹ But the Committee believed it necessary to phrase the article in more evasive terms, which go no further than to suggest that "it is proper to examine treaties which, by reason of new circumstances, may admit revision," thus leaving open the question how the examination might take place if, as is to be expected, one of the parties prefers to hold the other to the existing terms of the treaty.²²

The paragraph of Article V to the effect that "no treaties or other agreements entered into under violence or other form of compulsion shall be recognized as binding contracts, whether as between the parties themselves or in relation to third States" is a clear inference from a series of inter-American resolutions repudiating the use of force between States.²³ The Committee discussed the principle at length in the light of the probable necessity of imposing a peace treaty upon the Axis Powers by force. The conclusion

²⁰ The argument was based upon the Declaration of Principles of Inter-American Solidarity and Coöperation, adopted at Buenos Aires in 1936, in which it is laid down that "every act susceptible of disturbing the peace of America affects each and every one of them [the American States], and justifies the procedure of consultation . . .," and in which the principle is accepted, among others, that "any difference or dispute between the American States, whatever its nature or origin, shall be settled by the methods of conciliation, or unrestricted arbitration, or through operation of international justice."

²¹ The statement, released on July 16, 1937, refers to the revision of treaties in the following language:

"Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation." (Department of State Press Releases, July 17, 1937, p. 41.)

²² Even this vague phrasing met with objection from one of the American Governments. See below, n. 26.

The paragraph proclaiming that "treaties must be in the nature of open covenants openly arrived at" was believed to be a rule of inter-American law in view of the acceptance of the Covenant of the League of Nations by most of the American States and the independent acceptance of the principle by the United States. One of the members of the Committee was of the opinion that the clause "there must be no secret agreements or understandings between States" should be modified by adding "in matters affecting their relations to third States." But this was rejected by the Committee, partly on the ground that the only reason for secrecy would be the fact that the interests of third States were involved, and partly because, if it should become known that a secret treaty existed, third States would be suspicious of its terms however inoffensive these might be. See Minutes, p. 39.

²³ See Argentine Anti-War Treaty, 1933; Montevideo Convention on the Rights and Duties of States, Art. 11; Buenos Aires Declaration of Principles of Inter-American Solidarity and Coöperation, 3(a); Lima Declaration on Non-Recognition of the Acquisition of Territory by Force; Rio Resolution on Condemnation of Japanese Aggression.

was reached that a reaffirmation of fundamental principles of international law must be drafted as being applicable under normal conditions of peace, without reference to war or to the effects of war. Otherwise it would be necessary to revise the Montevideo Convention on Rights and Duties of States, as well as declarations of the Buenos Aires and Lima conferences, so as to make exception of forcible measures taken to restrain an aggressor.²⁴

The decision of the Committee to submit the Reaffirmation of Fundamental Principles of International Law to the American Governments for signature as a formal inter-American declaration was taken upon its own initiative. In a letter from the Chairman of the Committee to the Director General of the Pan American Union, it was suggested that the document be signed in Washington by duly authorized representatives of the American Governments with full powers. An alternative procedure would have been to submit the document to the American Governments for their observations, and then to revise it in the light of such observations. But the Committee was of the opinion that this would entail great delay; and that in view of the character of the document, being a restatement of principles believed to have been already accepted in substance by the American Republics, there was no reason why the Reaffirmation could not be signed in the form in which it was drafted by the Committee.²⁵ Obviously it would then be in order for any Government to attach "understandings" to its signature in case it should believe that a certain principle had been formulated in terms which were too broad or in terms which were susceptible of a wrong interpretation. Assuming that these understandings would not be contradictory or too numerous, the adoption of the Reaffirmation would mark another step forward in the definition and clarification of the law. This fact, taken in conjunction with the resolution of the Rio meeting, which seemed to the Committee to indicate an intention on the part of the Foreign Ministers that the Committee should use its judgment in the matter, was believed to be sufficient justification for the procedure followed.²⁶

²⁴ The further argument was made that international law has always recognized the subordination of agreements condemning the use of force to the primary right of self-defense against an aggressor. The covering letter of Secretary Kellogg specifically excepted wars of self-defense from the terms of the Treaty for the Renunciation of War. But even without that formal interpretation, the provisions of the treaty would not have been understood to apply to defensive action against aggression.

For other articles, in addition to those contained in the Reaffirmation, that were proposed by individual members but rejected by the Committee as a whole, see Minutes, pp. 23-24, 41-42.

²⁵ See Minutes, pp. 42-43.

²⁶ As it turned out, the decision of the Committee to recommend that the document should be signed in the form in which it was drafted, by duly appointed representatives of the American Governments, rather than be submitted to the Governments for their observations, proved to be inacceptable. A number of the Governments notified the Pan American Union of their intention to sign the document in the form submitted; others were prepared to sign it with understandings as to the meaning of particular paragraphs. The Government of

Following the drafting of the Reaffirmation, the Committee discussed at length the report of a subcommittee entrusted with the consideration of plans of future work.²⁷ With respect to problems arising out of the war in progress, it was clear that there were many subjects upon which it would be difficult for the Committee to formulate a uniform rule without conflicting with positions already taken by the different Governments. For this reason it appeared desirable to make preliminary inquiry of the Governments with respect to legislation and accompanying administrative regulations concerning such matters as the requisition of merchant vessels, the status of enemy aliens and of enemy alien property, the legal position of refugees and of stateless persons, the nationality of corporations, and the effect of war upon contracts.²⁸ In some cases it was evident that conditions had proceeded too far and were changing too fast to make it possible for the Committee to do more than coördinate the measures already taken by some Governments and to be prepared to make recommendations to other Governments that had not as yet taken definitive positions.

A further condition making it practically impossible to formulate uniform recommendations in respect to problems arising out of the war was the fact that the several American Governments were not all maintaining the same relation to the war.²⁹ In the case of States that were actually engaged in hostilities with the Axis Powers, the legal effects of the war would be on many points fundamentally different from those in the case of States which had merely broken diplomatic relations with the Axis Powers. Again there were the two States, Argentina and Chile, which were still maintaining relations with the Axis Powers although not observing the strictest neutrality, inasmuch as they had agreed at the Rio meeting not to consider as a belligerent an American State at war with a non-American State. An outstanding example of the conflicting attitudes was the case of contraband of war. The resolution of the Panama meeting of 1939 on contraband of war was taken with the object of protecting the interests of neutral States. But ten Amer-

Venezuela, however, taking exception to the paragraph relating to the revision of treaties (Art. IV), proposed an alternative text. Minor modifications, chiefly in respect to the Spanish text of the document, were also proposed. The Governing Board of the Pan American Union, acting upon the report of a subcommittee, thereupon postponed signature of the document and referred it to the American Governments for their approval in the modified form. Exception was taken by members of the Committee to this procedure, their position being that the modifications proposed by the Venezuelan Government should have been referred back to the Committee for further consideration. For the objection made to the procedure of the Governing Board, see *Ata da 19a Sessão*, pp. 1-6. For the text of the modifications proposed by the Government of Venezuela, see Appendix to Reports of Committee on Codification of International Law, Pan American Union, Oct. 19 and Dec. 30, 1942.

²⁷ For the report of the subcommittee outlining the variety of functions entrusted to the Committee, see Minutes, pp. 73-77, 91-94.

²⁸ See Minutes, pp. 78, 91-94.

²⁹ An analytical table classifying the various problems raised by the war and the relation to them of the three groups into which the American States were divided may be found in the Minutes, pp. 95-99.

ican States were now at war, and it was obvious that, as belligerents, they were interested in extending rather than restricting the scope of contraband. If the former Neutrality Committee had evaded a decision upon so controversial an issue, its successor found it even more necessary to do so under the changed circumstances.³⁰

Among the problems arising out of the war upon which the Committee believed that a uniform recommendation might be made, notwithstanding the different aspects it might present in a number of American States, was the legal position of refugees.³¹ The reporter entrusted with the problem prepared an elaborate questionnaire for submission to the Governments, analyzing the various aspects of the problem and seeking to elicit from the Governments information not only as to the facts with respect to the situation of refugees in the particular country, but also as to the attitude of the Government in question toward the points of law involved. How many refugees were to be found in the country? Among them, how many had kept their nationality? How many had been deprived of their nationality by their State of origin? From what countries did they come? What test did the particular Government apply in classifying persons as refugees? Were there any administrative regulations applicable exclusively to refugees as distinct from other aliens, and in this connection was any distinction made between refugees who kept the nationality of their State of origin and others who had lost it? Other questions related to the exemption of refugees from the provisions of labor legislation and from taxes imposed upon aliens, to identification cards, to the temporary or permanent character of the stay permitted to refugees, to special provisions for the naturalization of refugees, and like matters.³²

³⁰ The Panama Resolution (No. VII of the Final Act) registered the opposition of the American Republics to the placing of foodstuffs and clothing intended for civilian populations on lists of contraband, and declared that it was not to be considered contrary to neutrality to grant credits to belligerents for the purchase of such merchandise. For the text, see International Conferences of American States, First Supplement, 1933-1940, p. 330 (Carnegie Endowment for International Peace, Washington).

Resolution XXVI of the Rio meeting instructs the Juridical Committee "to continue the studies on the subject of contraband of war and on the project of a code relative to the principles and rules of neutrality." Under the circumstances, however, the Committee came readily to the conclusion that its studies in this field could be deferred until others of greater urgency had been completed.

³¹ The problem had already been studied in respect to the status of refugees in general, and the possibility of adopting for the American States provisions along the lines of the conventions adopted in Europe under the auspices of the League of Nations. See L. W. Holborn, "Legal Status of Refugees, 1920-1938," this JOURNAL, Vol. 32 (1938), p. 680; R. M. W. Kempner, "Enemy Alien Problem," *ibid.*, Vol. 34 (1940), p. 443; Sir John Hope Simpson, *The Refugee Problem*, London, 1939. The purpose of the Committee was directed toward the formulation of a uniform policy for the American States under the circumstances presented after three years of war.

³² See *Ata da 22a Sessão*, pp. 3-11 (text published by the Committee); *Ata da 23a Sessão*, pp. 2-8; *Ata da 24a Sessão*, pp. 3-14.

Proceeding to the study of post-war problems, the Committee found itself confronted with functions relating not to the application of existing rules of law but to the formulation of rules of law for the future, *de lege ferenda*. The resolution on Post-War Problems, adopted by the Rio meeting, was the outcome of a number of projects looking to the preparation of definite plans of a just and permanent peace. In his address at the opening session of the meeting, Under Secretary of State Welles had emphasized the need of unity among the American Republics in order that they "may prove to be the potent factor which they should be of right in the determination of the world of the future, after the victory is won."³³ The project introduced by the United States for the reorganization of the Neutrality Committee described the new committee as the "Inter-American Committee on Juridical and Post-War Problems" and gave it a broad authority "to consider problems having an international and juridical aspect arising in connection with the existing war of general interest to the American Republics. . . ." A project presented by the Peruvian delegation called upon its proposed Inter-American Committee on Juridical Solidarity "to prepare a plan for the reconstruction of international life at the termination of the war and to propose the measures which should be taken to carry out this plan." A Colombian project, after setting forth the basis of a "new order of peace," called upon the existing Neutrality Committee to "formulate recommendations in the juridical and political fields and in that of international security." An Ecuadorean project, pointing out the need that America "should present itself at the peace conference with uniform standards and ideals, in order that it may have an effective influence upon the decisions taken and may prevent the reappearance of the causes which gave rise to the present conflict and the chaos in which the world is engulfed," recommended to all of the American States "the creation of committees charged with studying the moral, juridical and economic bases of a just peace." A second Ecuadorean project and a second Peruvian project laid stress upon the necessity of the study of economic as well as political reconstruction. The resolution (No. XXV) on Post-War Problems, which resulted from these projects, recognizes the rela-

The term "refugee" as used by the reporter refers to "a person who, whether or not deprived of his nationality, in consequence of serious and notorious political conditions in the country from which he comes has left the territory of his own accord in order to preserve his liberty or has been constrained to leave it by the public authorities; and who, moreover, does not enjoy the diplomatic protection of another State." The reference is to refugees of non-American origin, and does not include American political exiles or emigrants.

In the course of the discussions the Chairman of the Committee referred to the case of stateless refugees (*apatridas*) as being the problem of greatest importance, and he expressed the view that, inasmuch as nationality is exclusively a matter of domestic legislation, a refugee should not be considered by a third State as still being a national of the State which has expressly deprived him of his nationality. See *Ata da 23a Sessão*, p. 3.

³³ For the text of the address, see Department of State Bulletin, Jan. 17, 1942, Vol. VI, p. 55.

tion between the political and the economic bases of a permanent peace, entrusting the Inter-American Juridical Committee "with the formulation of specific recommendations relative to the international organization in the juridical and political fields, and in the field of international security," and entrusting the Inter-American Financial and Economic Advisory Committee with a similar function in the economic field.³⁴

In spite of the fact that the resolution on Post-War Problems called for "specific recommendations" the Committee came to the conclusion that it was inexpedient to attempt to carry out this mandate until agreement could be reached with respect to the fundamental principles upon which detailed plans of reorganization must of necessity be based. The resolution, for example, referred to "international security." But a specific recommendation on that subject, involving the precise form of the international organization required and the methods by which it must protect its members against aggression, could only be made on the basis of certain broader understandings as to the degree of responsibility to be assumed by the community of nations for the maintenance of law and order and as to the political, economic and social conditions upon which it would be practically possible to make any system of collective security effective. While the Committee had already set forth some of these principles in its Reaffirmation of Fundamental Principles of International Law, it was clear that the scope of the post-war international law must be far wider than the "traditional" principles of law to which the Reaffirmation had been limited. The use of the word "political" in the resolution indicated the need of formulating new principles not hitherto recognized as rules of law; and account would have to be taken of the economic and social conditions which the preamble of the resolution had asserted to be intimately connected with the "new order of peace."

In view of these facts, the Committee came readily to the conclusion that its recommendation should be of a preliminary character, calling the attention of the American Governments to the basis upon which the Committee was conducting its studies and indicating the general lines of its approach to the problems before it. On the basis of the recommendation thus submitted, it was hoped by the Committee that the American Governments might be able to reach some measure of uniformity in their points of view and be prepared to adopt a common program when the occasion came to reach a definite decision. In the meantime, the Committee hoped to have the benefit of any projects which the American Governments might care to submit to it in accordance with the terms of the Rio resolution.³⁵

³⁴ For the text of the resolution, see Report, p. 52, and this JOURNAL, Supp., Vol. 36 (1942), p. 85.

³⁵ See Preliminary Recommendation on Post War Problems, Pan American Union, November 1942, Introduction. The document also appears in *Ata da Reunião de 18 de setembro, 1942, Anexo 3*.

On the basis of a draft submitted by one of its members,³⁶ the Committee decided to divide its recommendation into two parts, the first dealing with the causes of the war, and the second dealing with the principles that should guide the policy of States in the restoration of law and order after the war.³⁷ The usual procedure was followed of appointing subcommittees to draft the two statements in accordance with general understandings reached in plenary session. Part I of the recommendation as finally adopted deals with "Factors which contributed to the breakdown of international law and order." Here the Committee sought to present a survey of the limitations of international law before 1920, the defects of international organization after 1920, and the political, economic and social factors responsible, directly or indirectly, for the breakdown of law and order both in 1914 and in 1939. The decision to include a survey of the economic factors was due to the practical impossibility of segregating them from the political factors, notwithstanding the fact that the Rio meeting had assigned the economic aspects of reconstruction to the Inter-American Financial and Economic Advisory Committee, as well as to a special Inter-American Technical Economic Conference to be convoked.³⁸

Under the heading of "Limitations of international law before 1920," chief stress is put upon the recognition of war as a legalized procedure, the restricted scope of methods for the pacific settlement of international disputes, and the absence of a system of collective security. The section on "Defects of international organization" attempts to set forth the reasons for the failure of the League of Nations to accomplish the objectives proclaimed in the Covenant. The section on "Political Factors," after pointing out the fallacy of the theory of a balance of power and the inevitable breakdown of the system of competitive armaments, proceeds to show the disruptive character of political imperialism and political nationalism. This is followed by a section on "Economic Factors" in which imperialism and nationalism are presented in relation to industry and commerce. The distinction drawn between the two forms of imperialism and nationalism is somewhat arbitrary; but it appeared to the Committee desirable to put separate emphasis upon the false conceptions of national interest and of racial supremacy which were responsible for the aggression of the Axis Powers, and to bring out more clearly the effect of the measures of control over press and radio by which those governments had deliberately aroused in their peoples an exaggerated sense of the wrongs done them by other countries. On the other hand, the terms "economic imperialism" and "economic nationalism" were reserved

³⁶ See Minutes, p. 133.

³⁷ For the report of the subcommittee, summarizing the views of the different members in respect to the procedure to be followed, see Minutes, p. 128.

³⁸ See the introduction to the recommendation. The elaborate analysis made by the subcommittee of the basis upon which its draft was prepared may be found in *Ata da 11a Sessão, Anexo 1*.

for the monopolistic exploitation of backward territories and for the promotion by the individual State of its industrial and commercial interests by means of unfair trade practices and measures of ruthless competition which resulted in reprisals by other nations and general economic anarchy.³⁹

Under the heading of "Social Factors," attention is drawn to the fact that low standards of living within individual States had in many cases a direct connection with foreign policy. Economic insecurity helped to create in certain peoples sentiments of hostility toward the people of other countries as being responsible for their suffering. At the same time totalitarian governments were able to take advantage of the low state of public morale created by economic insecurity, and through control over press and radio were able to convert the hunger complex into the war complex, until the point was reached where no practical measures of alleviation would have been sufficient to restrain them.⁴⁰

Part II of the recommendation, entitled "Conclusions," is drafted in the form of a series of principles which the Committee believed should constitute the basis of a stable international system.⁴¹ The priority of the moral law is reaffirmed; war is repudiated as a legalized procedure; the community of nations must alone have the right to use force; the obligation to settle disputes by peaceful methods must be without limitations or qualifications; a collective responsibility must be assumed for the maintenance of law and order; and the conception of sovereignty must be modified so as to be consistent with the moral unity of the community of nations. Article VI emphasizes the necessity of a more effective international organization, while Article VII provides that the organization must be universal in character and that, whether it is to be based upon the League of Nations amended and

³⁹ It is obvious that the recommendation draws freely upon the literature of recent years bearing upon the causes of war in general and upon the failure of the League of Nations in particular. To attempt to make specific references to sources would be impossible. Phrases that called for quotation marks a decade or two ago have now become common property. But if one reference rather than another may be cited, the Committee discussed at length the views presented in the Preliminary Report of the Commission for the Study of the Organization of Peace (International Conciliation, April, 1941).

⁴⁰ The inclusion in the recommendation of the "Social Factors" responsible for the breakdown of law and order carries us even further outside the field of traditional international law than the inclusion of "Economic Factors." But the Committee was of the opinion that international law must henceforth include within its scope the same interests that are the concern of the individual State in the maintenance of domestic law and order.

⁴¹ The heading "Conclusions" was used partly to prevent any confusion with the Reaffirmation of Fundamental Principles of International Law already submitted to the American Governments and partly to avoid the suggestion that the Committee was competing with the Atlantic Charter or other formal pronouncements upon the fundamental conditions of a permanent peace. The discussion of the form and content of the fourteen articles of Part II took place chiefly in informal meetings of the Committee, the proceedings of which are not recorded in the Minutes. Drafts proposed as the basis of these discussions may be found in *Ata da 14a Sessão*, p. 4; *Ata da 15a Sessão, Anexo*; *Ata da 16a Sessão, Anexo 5*.

strengthened or is to be a new legal institution, "it must be so constituted as to reconcile the principle of universality of membership with the existence of regional groups formed by natural bonds of solidarity and common interests." Article VIII elaborates the principle of continental security contained in the resolutions of the Habana and Rio meetings of Foreign Ministers and extends it to the whole community of nations. Succeeding articles deal with the abandonment of the system of a balance of power, the limitation of armaments, the elimination of political and economic imperialism and nationalism, and the removal of the social factors that operate as indirect causes of war.

In drafting the Preliminary Recommendation on Post-War Problems, as in drafting the Reaffirmation of Fundamental Principles, the Committee followed a practice begun by its predecessor the Neutrality Committee, of signing its documents in three separate texts, so that each should have equal value with the others. In doing so, however, the Committee departed somewhat from the practice of inter-American conferences and consultative meetings. Instead of regarding one text as a master text, of which the others would be straight translations, the Committee itself examined all three texts and, in the case of the English text, admitted slight variations from the Portuguese and Spanish texts in order to make possible a more precise and forceful phrasing than would have been possible if certain abstract terms had been carried over into English from the Portuguese or Spanish in which the Committee reports had been presented.⁴²

During the course of its studies in connection with post-war problems, the Committee paused for a session on August 21 to register its protest over the sinking of five Brazilian coastwise ships by an Axis submarine. There was no question as to the violation of the laws of war; but the act was one of such incredible brutality that the Committee felt it could not let it pass in silence. The document recites the conditions under which the Brazilian ships were sunk, characterizes the act as inhuman in nature and wholly unjustified by the laws of war, and enters a formal protest against "this new attack which, if there were no other, would reveal the absolute contempt of the Axis Powers for the rights of other States and for every humanitarian sentiment."⁴³ Obviously the protest could not be expected to restrain the Axis Powers from their predetermined course. All it could do was to express the solidarity of the American Republics in the presence of another act of aggression of the

⁴² Inasmuch as the Recommendation on Post-War Problems did not call for any action by the American Governments, the Committee believed itself warranted in departing somewhat further from a literal translation than would have been permissible in the case of a conventional agreement. In justification of this practice it may be observed that a phrase originally drafted in English, then converted freely into Spanish and then retranslated back into English without reference to its original form will frequently take on a more abstract character in the process.

⁴³ For the text of the protest, see *Ata da 15a Sessão*, p. 2.

character contemplated in the Habana Resolution (XV) on Reciprocal Assistance and Coöperation.⁴⁴

Resolution XXVI of the Rio meeting specifies that the Juridical Committee will have as its object, among others, "To develop and coördinate the work of codifying international law, without prejudice to the duties entrusted to other organizations; . . ." The assignment of this task to the newly-created Committee was an obvious one in view of the elaborate provisions for the codification of international law made at various inter-American conferences and the meager results thus far attained.⁴⁵ As far back as the Second International Conference of American States, held at Mexico City in 1901-1902, provision had been made for a committee of American and European jurists to be entrusted with the drafting of codes of public and private international law.⁴⁶ The Third Conference, held at Rio de Janeiro in 1906, had created the International Commission of Jurists;⁴⁷ and from that time on, the successive conferences held at Santiago in 1923,⁴⁸ at Habana in 1928,⁴⁹ at Montevideo in 1933,⁵⁰ at Buenos Aires in 1936,⁵¹ and at Lima in 1938,⁵² had undertaken to reorganize existing agencies of codification or to create new ones. At the time of the Rio consultative meeting there were already in existence the following agencies of codification: (1) the National Committees, appointed by the separate Governments in whatever number thought desirable; (2) the Permanent Committees of Rio de Janeiro, Montevideo and Habana, appointed by the Brazilian, Uruguayan and Cuban Governments, respectively, each being composed of

⁴⁴ It was proposed by one of the members of the Committee that the connection between the act of aggression and the terms of the Habana resolution be specifically pointed out; but the majority of the Committee preferred to let that conclusion be drawn from the protest itself.

⁴⁵ See Report on the Status of the Work Provided for in the Resolutions on the Codification of International Law and the Improvement and Coördination of Inter-American Peace Treaties Approved by the Eighth International Conference of American States, Submitted to the Governments, Members of the Pan American Union, pursuant to Resolution XI of the Second Meeting of the Ministers of Foreign Affairs of the American Republics, held at Havana, July 21-30, 1940. The report shows that while the preliminary task of organizing the different committees and compiling the projects has been largely completed, the actual work of codification has scarcely begun.

⁴⁶ See International Conferences of American States, 1889-1928, p. 69.

⁴⁷ Convention on International Law, *ibid.*, p. 144.

⁴⁸ Resolution on the Codification of American International Law, *ibid.*, p. 245.

⁴⁹ Resolution on the Future Codification of International Law, *ibid.*, p. 439. At the Habana Conference provision was made that the draft-projects prepared by the Permanent Committees should be submitted to the Executive Council of the American Institute of International Law, which was to make a technical study of them and prepare a report upon them. In this way the American Institute, a private organization, became to the extent indicated an agency of the inter-American community.

⁵⁰ Recommendation (LXX) on Methods of Codification of International Law, *ibid.*, First Supplement, p. 84.

⁵¹ Resolution (VI) on Codification of International Law, *ibid.*, p. 145.

⁵² Resolution (XVII) on Methods for the Codification of International Law, *ibid.*, p. 246.

a number of nationals of the appointing State, together with six non-national members; (3) the Committee of Experts, composed of nine members selected from lists submitted to the Governments in accordance with a provision that only two of the persons selected by a particular Government should be its nationals; (4) the International Conference of American Jurists, to be composed of plenipotentiary delegates appointed by each Government, and to be convoked by the Pan American Union when the drafts prepared by the Committee of Experts appear to justify a meeting. In addition there is the Permanent American Aeronautical Commission, created by the First Inter-American Technical Aviation Conference, held at Lima in 1937, composed of jurists and aviation experts appointed by the separate Governments, whose function is "the gradual and progressive unification and codification of international public and private air law."⁵³

The functions of these different agencies of codification appear to have been assigned without any general plan of coördination. The National Committees may initiate studies and projects, to be sent to the Permanent Committees. The Permanent Committees coördinate projects sent by the National Committees but may themselves initiate projects. The Committee of Experts revises the studies of the Permanent Committees and sends drafts to the Governments for their comments; but it also may initiate projects. The International Conference of American Jurists is expected to deliberate upon the drafts submitted to it and to adopt conventions which are then to be submitted to the Governments for ratification. The Pan American Union acts as a sort of general secretariat for all of these groups, its functions being in general those of a clearing house for the transmission of projects and other material, although particular conferences have assigned to the Union specific duties of coöperation in the work of codification.⁵⁴

Before proceeding to organize the work of codification, the Juridical Committee had first to determine its competence in the matter. Here there appeared from the start a wide divergence of views. A majority of the

⁵³ See *Inter-American Agencies for the Codification, Unification and Uniformity of Law in the Americas*, Fourth Edition, April, 1942, Pan American Union. There is also the Permanent Committee of Jurists on the Unification of the Civil and Commercial Laws of America, but its functions lie outside the field of international law.

⁵⁴ The resolution of the Habana Conference (see above, n. 49) calls upon the Pan American Union to "coöperate in the preparatory work" to the extent that its statutes may permit. A resolution (XI) of the Habana meeting of Foreign Ministers (*International Conferences, First Supplement*, p. 358) called upon the Union to prepare a report on the "present status" of the work provided for in the resolutions of the Lima Conference. In fulfillment of that task the Union prepared the Report above cited (see n. 45). At the same time, acting in pursuance of Resolution XV of the Eighth International Conference of American States (*International Conferences, First Supplement*, p. 244), the Union has published (to date) four volumes under the title "The Perfection and Coördination of Inter-American Peace Instruments," containing projects submitted to the American Governments for their criticisms and comments and the replies received in regard to the same. The series bears the subtitle, "Codification of International Law."

Committee, including its distinguished Chairman, who happened to be at the same time Chairman of the Committee of Experts, were of the opinion that the terms of the resolution of the Rio meeting, that the Committee should have as its object "to develop and coördinate the work of codifying international law, without prejudice to the duties entrusted to other existing organizations," indicated an intention that the Committee should confine itself to the single problem of coördination, and that it should not itself venture into the field of codification by preparing drafts of its own, except in respect to matters coming within the competence of the Committee by reason of other provisions of the resolution creating it or of other resolutions of the Rio meeting.⁵⁵ One member dissented from this view, holding that the words "develop and coördinate" meant something more than merely coördinate, and that the proviso that the work of the Committee should not prejudice the work of existing organizations was to be understood as an intention on the part of the Rio meeting that the activities of the existing agencies of codification were not to be regarded as superseded by the functions assigned to the Juridical Committee.⁵⁶ Accompanying the discussion of this issue by the Committee was an interesting collateral question whether a meeting of Foreign Ministers was competent to change the provisions of resolutions of inter-American conferences. A meeting of Foreign Ministers is called for the purpose of consultation on matters of emergency specified in the agenda. May it go beyond that restricted field and deal with questions which have no direct connection with the conditions which have given rise to the meeting? Or is a meeting of Foreign Ministers on a par with an inter-American conference in respect to the subjects with which it may deal, so that its resolutions may properly modify those of a more formal international conference?⁵⁷

In view of the decision of the majority of the Committee to limit its activ-

⁵⁵ Minutes, pp. 87-89. While the Juridical Committee is listed by the Pan American Union (Inter-American Agencies for the Codification of International Law, 4th ed., p. 13) as an agency of codification, this was not regarded by the Committee as determining its competence in respect to the actual work of codification.

⁵⁶ Minutes, pp. 89, 131. This view was supported by the opinion of the Director General of the Pan American Union holding that the Committee "can take the initiative in the whole field of codification." See *Ata da 18a Sessão*, p. 8.

⁵⁷ For the divergent views of the members of the Committee on this question, see Minutes, pp. 87-89, 131; *Ata da 18a Sessão*, p. 14; *Ata da 21a Sessão*, p. 6. The discussion of this point led to a lengthy discussion of the difference, in point of contractual character, between a formal treaty and a mere resolution or declaration. What was the legal force of the Declaration of Lima, for example, or the Habana Resolution on Reciprocal Assistance? Both agreements entered into force without the necessity of ratification. Did this mean that they had only the value of moral obligations? Or was the obligation "legal" in the usual sense of that term in international law, but of such a vague character as not to commit the signatory State to acts sufficiently specific to amount to an agreement in violation of the constitutional requirement of ratification in States whose constitutions required the ratification of treaties. See *Ata da 25a Sessão*.

ities in the field of codification to recommendations in respect to the co-ordination of the work of existing agencies, no further steps were taken with respect to problems such as the recognition of new governments, pecuniary claims, the nationality of juristic persons, judicial assistance, and other subjects which the United States member had listed as appropriate topics for codification. It was agreed, however, to proceed with the reorganization of the work of existing agencies of codification, in respect to which no divergence of opinion existed.⁵⁸

Specifically assigned to the Committee by Resolution XXVII of the Rio meeting was the topic, "Coördination of the resolutions, declarations and other acts of previous meetings of the Ministers of Foreign Affairs."⁵⁹ The resolution was based upon a project introduced by the Government of El Salvador and its preamble was taken directly from the project, which ascribed the necessity of the proposed coördination to the "continual changes which characterize the present period of emergency" and proposed that the method of coördination should be "by incorporating the changes which circumstances require." It was suggested by one of the members that inasmuch as the same need of coördination was presented by the resolutions and other acts of inter-American conferences, the study to be undertaken by the Committee might properly include these latter as well; and an analytical table suggesting a logical classification of the resolutions and acts both of consultative meetings and of conferences was put before the Committee.⁶⁰ But in view of the specific mandate of the Rio meeting, it was decided to confine the study for the present to the acts of consultative meetings only.⁶¹

It was not clear, however, what was intended by the word "coördination," and the Committee discussed at length the various meanings which might be attached to it.⁶² A subcommittee was appointed to study the subject more in detail and to present suggestions as to the scope of the problem. On the basis of an elaborate analysis of the resolutions and other acts of the three consultative meetings, the subcommittee came to the conclusion that coördination should be understood as embracing not only a logical classification of the subject-matter, but a critical examination of each separate resolution in an endeavor to determine its present application and its relation to other resolutions of the same or of other meetings. The critical examination of the separate resolutions should have as its objectives: (1) the elimination of resolutions believed by the Committee to be no longer in force, as,

⁵⁸ In view of his experience with the work of codification as Chairman of the Committee of Experts, the Committee requested Dr. Mello Franco to undertake a study of this aspect of the problem.

⁵⁹ For the text of the resolution, see Report, p. 54, and this JOURNAL, Supp., Vol. 36 (1942), p. 87.

⁶⁰ See *Ata da 18a Sessão, Anexo A.*

⁶¹ *Ibid.*, p. 14.

⁶² *Ata da 21a Sessão*, pp. 3 ff.

for example, certain of the resolutions on the subject of neutrality taken at the Panama meeting of 1939; (2) the incorporation of the resolutions of an earlier meeting with resolutions on the same subject taken at a later meeting; (3) the combination into a single resolution of a number of resolutions bearing upon the same topic; and (4) the arrangement in more logical order of the resolutions and other acts believed by the Committee to be still in force. The subcommittee was also of the opinion that the problem of coördination might properly be extended so as to include recommendations bearing upon the organization of individual meetings, particularly with respect to the coördination of the final act with the agenda and with the organization of committees and subcommittees. It was pointed out that, as things now stand, the final act of a particular meeting presents the various resolutions and other acts in the order in which they happen to be adopted by the meeting, without any reference to their subject-matter or to their relation to the agenda; so that resolutions duplicate one another and the importance of the leading decisions of the meeting is in some degree obscured by placing them side by side with others of merely passing interest.⁶³

A further suggestion made in the report of the subcommittee was that each consultative meeting should appoint a "Coördinating Committee," whose functions would be to bring the various resolutions of the particular meeting into harmony, avoiding duplication, grouping resolutions bearing upon the same topic into a single resolution, indicating the relation between the resolution adopted and resolutions taken at previous meetings, and arranging the final act in logical order.⁶⁴

The work of the Juridical Committee has now progressed sufficiently to make clear the advantages of a permanent agency for the performance of the wide variety of juridical functions created by the close relationships which have developed between the American Republics of recent years. These functions appear to be extending in range and increasing in importance with the growth and development of the economic and social interests of the American Republics. The law must keep pace with the facts; new principles must be proclaimed to give guidance to the movement for closer coöperation; and new rules must be formulated to give stability to the application of principles to changing conditions and circumstances.

⁶³ For the report of the subcommittee, see *Ata da 23a Sessão*, p. 8. Analytical tables presenting alternative classifications of the consultative meetings at Panama, Habana and Rio de Janeiro, arranged according to subject-matter and according to the particular meeting, may be found as appendices to the *Atas* of the 20th and 21st sessions. An appendix to the *Ata* of the 24th session contains a suggested classification for future consultative meetings, and an appendix to the *Ata* of the 25th session reclassifies in accordance with this table the work of the three meetings already held. The complexity of the task of coördination is evident, and the need of it equally so.

⁶⁴ The existing Committees on Coördination are no more than drafting committees, appointed to bring the four texts of the final act into harmony.

It is not difficult to forecast the growth of "continental solidarity" in the coming decade if the same spirit of mutual understanding and friendly coöperation continues as it has been manifested during the past decade. The organization of the inter-American community has now passed its earlier "conference stage." Consultative meetings have become an accepted form of emergency conferences.⁶⁵ The permanent secretariat of the Pan American Union has been supplemented by numerous permanent administrative agencies created to meet the political, juridical, economic and social interests of the community, and these in turn are being assisted by frequent special conferences whose reports and recommendations offer material for administrative decisions. What is needed now is to coöordinate the activities of these different bodies and to make them contribute more effectively to the common objective they have in view. The Juridical Committee, as has been seen, has been called upon to make recommendations in this field.

In the field of political coöperation it is clear that great progress has been made. The contrast between the emphasis upon non-intervention at Montevideo in 1933 and the concern for continental defense at Rio de Janeiro in 1942 marks an essential change in attitude. If the present worldwide conflict is undermining the foundations of the international law of the past, it is also indirectly laying the foundations of a more solid structure of inter-American law for the future. The principles which must animate this law have been made more and more definite in the resolutions and declarations of recent years, and each new expression of them has added to their force. It remains now to formulate in more precise terms the rules of substantive and procedural law by which these principles may be given practical and concrete application. Here obviously are manifold functions to be performed by a permanent juridical committee.

As in the field of political coöperation, so in that of economic coöperation, the progress of the past ten years is but the beginning of the greater progress that lies ahead. At Montevideo the purpose was chiefly the negative one of avoiding practices obstructive of commercial intercourse. At Rio de Janeiro the concern was with the development of natural resources and the expansion of national industries looking to a stronger economic system for the continent as a whole. The end of the war need not mean the cessation of the present forms of mutual assistance, but rather their continuance along different lines.⁶⁶ It is reasonable to expect that the practical measures taken to carry out the objective of continental defense: the creation of the Inter-American Development Commission, the Resources Commission, the

⁶⁵ See, on this point, "The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro," this JOURNAL, Vol. 36 (1942), p. 198 ff.

⁶⁶ Article XIII of the Preliminary Recommendation on Post-War Problems contemplates a program of reconstruction which would require elaborate administrative machinery.

Financial and Economic Advisory Committee and other administrative bodies, will all tend to bring the American States to a realization of what they have to gain by economic coöperation quite apart from the emergency of continental defense that has called these agencies into existence. All this will mean in due time the formulation of a body of administrative law which may be expected to bear the same relation to international law which administrative law at present bears to constitutional law.

A generation ago few international lawyers concerned themselves with what are now called the "social relations" of States. A treaty relating to matters of public health or similar interests obviously entailed the ordinary obligations of a treaty; but beyond that international law did not go. The function of law as a means of promoting common interests as well as of adjusting conflicts of claims was as yet imperfectly realized. Nor was any thought given to the fact that the social conditions within a given State and the extent to which its citizens might enjoy the privileges of freedom of speech and other guarantees of the Bill of Rights might bear a relation to the foreign policies of the State and affect directly the degree to which it might be relied upon to fulfill its duties as a member of the international community. A new conception of common social interests came with the close of the war of 1914-1918, and a special application of that new conception began with the Seventh International Conference of American States at Montevideo in 1933. Looking ahead to the future it would seem clear that the problem of social justice, in the broad sense of the term, must be regarded as an international problem and must be brought of necessity within the scope of international law.⁶⁷

What is to be the relation of the new inter-American law to the new international law that is to be developed to meet the needs of the international community as a whole after the war? A decade or more ago there was much discussion whether the attempt to develop an "American International Law" was a logical one, and if logical, expedient. The controversy would now seem to be resolved in the general realization that, however vital and far-reaching the interests that have been developed between the American States of recent years, and however necessary in consequence the clarification and definition of the rules of law by which those interests are to be protected and promoted, the inter-American community is an integral part of the larger world community. Only in a world that is organized for the maintenance of law and order can the American States find continental security; only in an international community that is seeking the ends of justice and is coöperating to promote the common good of all can the inter-American regional group succeed in advancing the special interests which its members have in common. Continental isolation is now no more possible than is the

⁶⁷ Compare the provisions of Art. XIV, "Elimination of the Social Factors of War," of Part II of the Preliminary Recommendation. Above, n. 40.

isolation of individual States.⁶⁸ The organization of States by regional groups may come to play an important rôle in the promotion of special group interests; but law and order must be conceived primarily in universal terms if the stability essential even to regional coöperation is to be attained.

⁶⁸ In the Joint Declaration of Continental Solidarity adopted at the meeting of Foreign Ministers at Panama, the Governments of the American Republics, after reaffirming the Declaration of Lima and their intention "to maintain and strengthen peace and harmony among the Republics of America," declare:

"That these principles are free from any selfish purpose of isolation, but are rather inspired by a deep sense of universal coöperation, which impels these nations to express the most fervent wishes for the cessation of the deplorable state of war which today exists in some countries of Europe, to the grave danger of the most cherished spiritual, moral and economic interests of humanity, and for the reëstablishment of peace throughout the world—a peace not based on violence, but on justice and law."



TREATMENT OF CIVILIAN ALIEN ENEMIES

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A large-scale problem for the principal belligerents in the present war is that of the treatment of civilians of enemy nationality in their respective jurisdictions. Measured in terms of the number of human beings involved, national safety considerations, and the possibly unfortunate effect at home of mishandling it, the problem assumes far-reaching importance. There is need for clear law as well as positive action. There is need for perspective. In relation to international law, the distinctiveness of the classification of "civilian alien enemy," past effort looking to the construction of internationally binding rules prescribing treatment, and practice in the current war, merit attention.

The present inquiry has to do with only some aspects of the problem, especially the classification of noncombatant persons of enemy nationality in the jurisdiction, the custody of those considered dangerous to the interests of the State of residence, and restraints upon the liberty of others. It does not deal, except quite incidentally, with judicial remedies of alien enemies, or with the matter of alien enemy property. It is restricted, in so far as possible, to the problem as encountered in national territory rather than in occupied territory. Emphasis is upon international law aspects rather than upon municipal, and particular attention is given to practice of the United States.

There are difficulties in the matter of basic classifications, as well as terminology. In general, the designation of persons as "civilian" alien enemies rests upon the assumption, particularly familiar since the time of Rousseau, that it is feasible and desirable to distinguish combatants in a war from noncombatants. A considerable body of writing in recent years has tended to the conclusion that so-called total war, and particularly air warfare, has caused this distinction to be broken down. Even the term "enemy" tends to cause undue hardships if applied without discrimination. Ideological cleavage in the twentieth century has unquestionably caused a mere nationality test for determining "enemy" character to be less adequate than in past wars.¹ The possibilities of dual nationality, and denaturalization for reasons of lack of loyalty, are present. New types of activity in war present new questions of terminology. The different connotations which it is possible to assign to such terms as "saboteur" and "partisan" do not make for perfect clarification of thought.

To the extent that the traditional distinction between combatant and non-

¹ Cf. Francis Biddle, "The Problem of Alien Enemies," *Free World*, Vol. 3, pp. 201, 203 (Aug., 1942).

combatant should be abolished, the ordinary hazards of the soldier would become the lot, actually or potentially, so far as dealings with the enemy are concerned, of all the citizenry. There is, as suggested above, an opinion that certain developments, particularly in aerial warfare, have gone far toward bringing about this result. However, it can hardly be said that the traditional classification has yet become obsolete. Restated rules as to the conduct of hostilities and the treatment of persons in occupied territory emphasize the fact,² as do internments of military persons coming within the jurisdiction of States not engaged in the war. At the same time, the distinction is apparently often blurred in the popular mind. Even official decrees sometimes fail to draw an adequate line, in terms if not in their actual administration, between prisoners of war and civilians interned.³

The matter is one in which courts, and not merely policy makers, may be concerned. Some cases before the German-American Mixed Claims Commission illustrate the manner in which the question may come before international tribunals. The Christian Damson claim was brought for impairment of health and loss of personal effects of a noncombatant, over fifty years old, who was in the employ of the United States Government, in the Army Transport Service, when the ship of which he was master was sunk while en route in ballast from France to the United States. The Umpire refused to the claimant the status of "civilian" within the meaning of paragraph 2, Annex I, Section I, of Part VIII of the Treaty of Versailles, which was incorporated by reference in the Treaty of Berlin.⁴ The paragraph covered

(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or mistreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labor), wherever arising, and to the surviving dependents of such victims.

The Umpire said that the test for determining who were civilians involved the question of whether their activities were at the time aimed at the direct furtherance of a military operation against Germany or her allies. This claimant's activities were found to have been so directed.⁵

In another case before the commission, Umpire Parker referred somewhat anomalously to a "civilian prisoner of war," in reference to the master of the American schooner *Winslow* who was taken on board the German auxiliary cruiser *Wolf* and eventually sent to a prison camp in Germany. As to the law involved, the Umpire said that, "It will not be profitable here to consider the legality or illegality as tested by rules of international law of such capture, confinement and detention. As this Commission has frequently held, Ger-

² See, for example, Oppenheim, *International Law* (6th ed.), II (1940), p. 172.

³ On the use of the term "prisoners of war" to designate persons other than military prisoners, see W. E. S. Flory, *Prisoners of War* (1942), pp. 24-27.

⁴ 42 Stat. (Pt. 2), 1939; this *JOURNAL*, Vol. 16 (1922), p. 10.

⁵ Decisions and Opinions, p. 243, Docket No. 4259; this *JOURNAL*, Vol. 19 (1925), p. 815.

many's liability in cases presented here is determined not by rules of international law but by the terms of the Treaty of Berlin irrespective of the legality or illegality of the act complained of." The decision was that the claim fell within the paragraph quoted above concerning civilians injured.⁶ It was noted that the British Reparation Claim against Germany included under a schedule dealing with "injury to persons or injury to health of civilians" an item of 2,454 internment cases, with damages aggregating £687,120.

As is well known, statutory definitions of alien enemy became important in the World War of 1914-1918, and have become so in the present one, especially in connection with legislation on trading with the enemy,⁷ and the administration of alien enemy property.⁸ These municipal laws do not, however, clarify the situation for all purposes as to the rights and duties of those civilians of enemy nationality who are in the jurisdiction at the outbreak of war.

It is a striking fact that while there are elaborate provisions in treaties regulating the treatment of combatants who become prisoners of war,⁹ no comparable rules have been established as to civilians. The classification of civilian alien enemies is in general use, but no "code" concerning their treatment has found general acceptance. It is perhaps natural that, under these conditions, there should be official effort to have civilian internees assimilated to prisoners of war for the purpose of assuring some protection, and that the former should be granted the minimal guarantees of the latter which are reasonably applicable to them.

In the nineteenth century bilateral treaty provisions on the subject of the effect of war upon resident civilians of enemy nationality became fairly general.¹⁰ The United States early in the history of its treaty-making concluded

⁶ Robert D. Trudgett claim, Dec. and Ops., pp. 806, 818, Docket No. 4890.

⁷ See note, "Who Is An Alien Enemy?", *The Solicitor*, Vol. 9, No. 1, p. 4 (Jan., 1942); Earl G. Harrison, "Alien Enemies," *Penn. Bar Ass'n Quarterly*, Vol. XIII, pp. 196-201 (Apr., 1942); Otto C. Sommerich, this *JOURNAL*, *infra*, p. 58.

⁸ On the treatment of property, see James A. Gathings, *International Law and American Treatment of Alien Enemy Property* (1940).

⁹ R. R. Wilson, "Standards of Humanitarianism in War," this *JOURNAL*, Vol. 34 (1940), pp. 320-324. On the development of law on the general subject, see Wm. E. S. Flory, *op. cit.* The recently reported death by starvation of thousands of Russians held as prisoners of war in Finland is a reminder that this part of the problem is not completely solved by the elaboration of rules.

¹⁰ See the list in Hall, *International Law*, 4th ed., p. 407n. At the outbreak of war between France and England in 1803, Napoleon held some ten thousand English civilians, but apparently without making any claim that he could rightfully make them prisoners of war. Rather, his act was one of reprisal against the British for their initiation of hostilities by capture of French merchantmen without a declaration of war. See Fauchille, *Droit international public* (1921), II, Sec. 1052.

A useful short summary of action taken in the World War of 1914-1918 is in the sixth edition of Oppenheim, *op. cit.*, at pp. 248-251.

agreements setting limits to what could be lawfully done to nationals of one State in the territory of the other when war should break out between them. Thus the 1785 treaty with Prussia provided that,

If war should arise between the two contracting parties, the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance; and all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen unarmed, and inhabiting unfortified towns, villages and places and in general all others whose occupations are for the common subsistence and benefit of mankind shall be allowed to continue their respective employments, and shall not be molested in their persons. . . .¹¹

Although in the Annex to Hague Convention IV of 1907 there were provisions restricting what might be done by occupant belligerents to residents of the occupied territory,¹² no single general convention to regulate the treatment of civilians of enemy nationality was perfected at the Hague Conference of that year.

Late in the World War of 1914-1918, rules concerning prisoners of war were formulated for application between Germany and her principal enemies.¹³ The unratified American-German agreement, which was drawn up just at the time of the armistice, set forth (in Art. 23) that the treatment of prisoners of war should follow principles laid down in international agreements; in a later article it provided that this and other mentioned rules in the list (such as those concerning communication, sanitary conditions, and discipline) should apply to civil prisoners in the same manner as to prisoners of war, with such modifications as circumstances might require, "provided, always, that no such modification shall be less favorable to the prisoners than the

¹¹ II Miller, *Treaties*, 162, 178. There was a similar provision in Art. XII of the treaty of commerce and navigation with Italy, Feb. 26, 1871 (17 Stat. 845, 855). Such provisions are not in the 1884 and 1911 commercial treaties between the United States and Japan (29 Stat. 848, 37 Stat. (Pt. 2), 1504), nor in the 1923 treaty of friendship, commerce and consular rights with Germany (44 Stat. 2132).

The United States statute to give effect to such treaties provided: "When an alien who becomes liable as an enemy in the manner prescribed in Section 21 of this title is not chargeable with actual hostility, or with crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality." R. S. Sec. 4068, as derived from Act of July 6, 1798, c. 66, Sec. 1, 1 Stat. 577, Act of July 6, 1812, c. 130, 2 Stat. 781, 50 U.S.C.A., Sec. 22.

¹² 36 Stat. 2277, Annex, Sec. III.

¹³ 11 *Nouveau Recueil Général* (3rd ser.), 37, 68, 86. A text of the German-American rules is in U.S. Foreign Relations, 1918, Supp., II, pp. 103-157.

original provision, and that consideration be paid to their education and profession."¹⁴

On July 27, 1929, delegates signed at Geneva the new multilateral convention on prisoners of war, with a more complete "code" of rules than Hague Convention IV had provided.¹⁵ There was still no multilateral instrument in force which had for its primary purpose the protection of civilian alien enemies against arbitrary treatment by States. In 1934, at the Fifteenth International Red Cross Convention, held in Tokyo, a plan was presented for a convention which would look to the protection of civilians of enemy nationality in the territory of a belligerent or in territory occupied by him.¹⁶ In the first article, civilians for whose benefit the projected agreements was intended were characterized as follows: "(a) They do not belong to the land, sea, or air forces of the belligerents as defined by international law, particularly by Articles 1, 2 and 3 of the Regulations annexed to the October 18, 1907 Hague Convention No. IV, concerning the rules and customs of war on land; (b) they are nationals of an enemy country and are in the territory of a belligerent or in a territory occupied by him." Such persons, being in enemy territory when war started and wishing to leave, were to "obtain for this purpose within the shortest possible delay the necessary authorizations, as well as all facilities compatible with said operations." They were to have the right to take with them their personal effects and the money necessary for the trip.¹⁷ As exceptions, enemy civilians were to be detainable if they were (a) persons liable to be mobilized immediately or within a year, according to the laws of their own country of residence; (b) persons whose departure might be opposed "on the basis of reasonable considerations connected with the safety of the detaining Power."¹⁸ Enemy civilians who should remain in the territory or be detained there and not interned were to receive the same treatment as "that accorded to soldiers in ordinary times," except for such measures of supervision or safety as might be ordered. They were to be permitted to pursue their occupations "as long as military operations permit," to have the right to communicate with their families and to receive aid ("except for such measures as may be applied to the population as a whole"), to present themselves to duly recognized aid societies, and to be

¹⁴ Art. 169. Art. 170 would have put limitations upon the labor which captors could require of civil prisoners. The work of camp maintenance and sanitation could be required. Prisoners might be given other work upon their own request.

¹⁵ 47 Stat. 2021; this JOURNAL, Supp., Vol. 27 (1933), p. 59.

¹⁶ French text in *Quinzième Conférence Internationale de la Croix-Rouge* (1934), pp. 262-268. Quotations in this comment are from an English translation of this text.

¹⁷ The plan contemplated the organization of civilians' departure, taking into account "all the exigencies of humanity," and permitted special agreements among belligerents on repatriation.

¹⁸ In the case of either category, recourse to the protecting Power was to be permitted. The protecting Power could demand that an inquest be instituted and the result communicated to it within three months after demand.

protected against acts of violence, insults and public curiosity. Measures of reprisal against them, as also the taking of hostages, were to be forbidden. Enemy civilians who might be brought into belligerent territory were to have the same guarantees as those who had been in the territory since the beginning of military operations.

Under the proposed plan, confinement of enemy civilians to a given region, was, as a rule, to be preferred to internment. Internment was permissible for persons who were liable to mobilization, or if the safety of the detaining State should demand it, or "if the position of the enemy civilians is such as to make it necessary." Camps were not to be installed in unwholesome regions or where the climate would be harmful to the health of those interned. By Article 17,

In all others matters the Convention of July 27, 1929 relative to the treatment of prisoners of war will be applicable by analogy to interned civilians.

The treatment accorded interned civilians may under no circumstances be inferior to that described by the said Convention.

A separate chapter related to treatment of enemy civilians in occupied territory. It envisaged "exceptional circumstances" in which the taking of hostages might seem indispensable to the occupying State, but provided for the protection of hostages against death, corporal chastisement or other inhumane treatment. It would also have proscribed all deportations of civilians except as to evacuations carried out (because of the spread of military operations) for the safety of the inhabitants.

Another chapter, on the execution of the convention, covered the compulsory posting of the rules at places of internment, the exchange of laws and by-laws adopted by governments for the purpose of carrying out the plan, and the permitted intermediation of the protecting Power in such matters as inspections.¹⁹ It provided for the exercise of good offices of protecting Powers when there should be disagreements concerning the application of the rules.²⁰ It also contained the provision, found in the 1929 Prisoners of War Convention (but in contrast to the rule of the Hague Conventions) that if all

¹⁹ Delegates designated by a protecting Power from its own nationals or from those of other neutral States, when approved by the belligerent in whose territory they were to exercise their missions, were to be authorized to go into any locality where civilians were interned, and to be allowed to converse with them either personally or through interpreters and, as a general rule, without witnesses; military authorities were to be informed of their visit. The plan further contemplated agreements between belligerents permitting persons of the same nationality as the interned civilians to participate in tours of inspection.

²⁰ In this connection, each protecting Power was to be allowed to propose a meeting of belligerents' representatives in properly selected neutral territory. The International Committee of the Red Cross was to be invited to assist at the meeting. Furthermore, these dispositions were "not to be construed as an obstacle to the humanitarian activity that the International Red Cross Committee may be able to inaugurate for the protection of enemy civilians, the consent of the interested belligerents having been obtained."

belligerents in a war were not parties to the convention, its rules would nevertheless remain obligatory for those which were parties.

A resolution endorsed the principles here summarized, and recommended that there be a diplomatic conference on the subject-matter. This resolution received unanimous support at the Red Cross Conference, but the complete plan has never been embodied in a perfected treaty. At the Conference in Tokyo a reporter drew attention to the "inexplicable lacuna" in the laws of war which these rules were designed to fill.²¹ At the outbreak of the war in Europe in September, 1939, there were no general rules of a multilateral convention in effect for the benefit of civilian alien enemies except the above-mentioned Hague Convention rules concerning treatment of civilians during military occupation. However, usage appeared to have set the trend toward requiring for civilian internees, as a minimum, general privileges (except in so far as they were not reasonably applicable) which could be claimed for military prisoners.²² This left much to be determined by the domestic law of each belligerent State. It left some matters to be arranged, if arranged at all, through reciprocal commitments after the outbreak of hostilities. Resort to war did not, of course, terminate guarantees under preëxisting bilateral treaties designed for the protection of civilians under war conditions.

The actual treatment of enemy civilians by the principal European belligerents in 1939 and following was somewhat different from what it had been in 1914, due largely to new factors which guided policy. There was, for example, the fact that in countries such as Great Britain and France there were many persons who, although they still were, technically, or at least had been, nationals of Germany, were now victims of persecution in that State and were strongly anti-Nazi in their views.²³ At the outbreak of the war there were some 238,000 aliens in Great Britain, as compared with a much larger number in France. About one-third of the 238,000 were German or Austrian nationals, of whom probably 50,000 had come in as refugees during the preceding six years.²⁴ The three-fold classification of persons according to the state of their sympathies was quickly begun by the British. In the House of Lords on October 23, 1939, Viscount Cobham, the Under Secretary of State

²¹ Document cited in note 16, *supra*, p. 203 (report of Mme. Frick-Cramer).

²² Maximilian Koessler, "Enemy Alien Internment: With Special Reference to Great Britain and France," *Political Science Quarterly*, Vol. 57, pp. 98, 111 (March, 1942). *Cf.* comment, "Alien Enemies and Japanese-Americans: A Problem of Wartime Controls," *Yale Law Journal*, Vol. 51, No. 8, pp. 1316, 1317 (June, 1942).

²³ Robert M. W. Kempner, "The Enemy Alien Problem in the Present War," this *JOURNAL*, Vol. 34 (1940), pp. 443-458; Warner Rosenberg, "Aliens—Friends and Enemies," *Contemporary Jewish Record*, Vol. 5, pp. 282-290 (June, 1942). See, in regard to municipal law aspects of internment in Great Britain, E. J. Cohn, "Legal Aspects of Internment," *Modern Law Review*, Vol. 4, pp. 200-209 (Jan., 1941).

²⁴ *Parliamentary Debates*, 5th ser., Vol. 362, p. 1234 (statement in the House of Commons, July 10, 1940, by Mr. Peake, Under Secretary of State for the Home Department); section on "Alien Enemy Control in Great Britain," in Tolan Committee report, cited in note 44, *infra*, p. 42.

for War, said that, the treatment of civilian internees in the United Kingdom would "not be less favorable than that accorded to prisoners of war."²⁵ With the defeat of France, the strong impression created in Great Britain as to what "fifth columnists" had done in the countries which the Germans had conquered, and the entry into the country of a great number of additional refugees, it was to be expected that greater vigilance would be exercised in England. From the legal point of view, the Convention concerning the Status of Refugees Coming from Germany, of February 10, 1938,²⁶ was a factor to be taken into account, in addition to respect for ordinary civil rights. Temporary emergency measures included the removal from a coastal belt on the east and southeast coasts of all able-bodied male Germans and Austrians between the ages of sixteen and sixty, in order that they might be held in temporary internment.²⁷

The question naturally arose as to how much publicity could be given to the Government's measures. On June 11, 1940, the Under Secretary of State for the Home Department told the Commons that it would be "impracticable to publish the names of the 10,000 persons interned as alien enemies," and that it would "obviously not be in the public interest to give details of measures taken in the interests of public security."²⁸ There followed some criticism of the Government's actions and of its apparent disinclination to give out statistical information concerning internments.²⁹ After Japan

²⁵ Parl. Deb., 5th ser., Vol. CXIV, p. 1482. On British internment, see especially Cmd. 6217, Cmd. 6223, Cmd. 6233.

²⁶ League of Nations Doc. C. 75. M. 30. 1938. Refugees coming from Germany were "persons who are proved not to enjoy in law and in fact the protection of the German Government." By Art. 8, par. 1, "refugees shall have, in the territories to which the present convention applies, free and ready access to the courts of law." One writer has pointed out that the exclusion of certain refugees from the enemy country from the classification of "alien enemies" dates back, in England, to the Anglo-French War after the revocation of the Edict of Nantes. The English King did not include the French Huguenots in the category of his enemies. Warner Rosenberg, *loc. cit.* See also, H. J. Feist, "The Status of Refugees," *Modern Law Review*, Vol. 5, pp. 51-53 (July, 1941).

²⁷ Parl. Deb., 5th ser., Vol. 362, p. 1238 (July 10, 1940). The debate brought out that six to seven thousand of the most dangerous internees had been sent to Canada, including some Nazi seamen who were classified as civilian internees. (*Ibid.*, p. 1245.) When the British Government proposed to release some of the internees who had been sent overseas, the Dominion Government apparently objected, on the ground that the persons had been sent for safekeeping, and not for immigration. See "Position of Aliens in Great Britain in War Time," *The Social Service Review*, Vol. 16, pp. 327-332 (June, 1942).

²⁸ Parl. Deb., 5th ser., Vol. 361, p. 1124, 1126. The Under-Secretary said that persons could, of course, communicate with their friends, so that there was no question of anybody's being detained without other persons being aware of the circumstances.

²⁹ See, for example, Francois Lafitte, *The Internment of Aliens* (1940), p. 76 *et seq.*, and p. 178. This author particularly criticized the proposals to "intern the lot" and to keep all but "useful" enemy aliens locked up. A reference to statistical information was made in the House of Commons on July 31, 1940, by Mr. Peake: "The staff of the Home Office are devoting all their attention at the present time to going through the categories of persons who have been interned by mistake, and I do not want to divert them from that job in order to procure statistical information of an elaborate character." (Parl. Deb., 5th ser., Vol. 363, p. 1230.)

entered the war, a spokesman for the British Government announced that, out of some 500 Japanese in the country, about 100 had been interned.³⁰

The present inquiry is directed to the treatment of persons in the national territory of a belligerent State, rather than in occupied territory, but in the case of the principal Axis State it is difficult, without being unrealistic, to consider only what has been done within the Reich. Certainly Germany's treatment of civilians in the countries which she occupies represents a far cry from the standards proposed in the 1934 plan. Deportations, forced labor, and shootings of hostages have been conspicuous features of the German policy. These excesses led representatives of nine European governments-in-exile, who met in London early in January, to conclude a solemn agreement making it one of their principal war aims to punish those guilty of ordering or carrying out the execution of hostages.³¹ As of July 1, 1942, the Germans were reported to have approximately six millions of foreign laborers in the Reich, of whom at least half were acknowledged civilians.³²

³⁰ Parl. Deb. (Commons), 5th ser., Vol. 378, p. 1645 (March 19, 1942). It was stated that the policy had been to effect internment on a selective basis rather than to have general internment.

³¹ See Arthur K. Kuhn, "The Execution of Hostages," this JOURNAL, Vol. 36 (1942), pp. 271-274. In a statement of Aug. 21, 1942, concerning crimes against civilian populations in occupied countries, President Roosevelt repeated what he had stated on Oct. 25, 1941, which was, in part, as follows: "The Nazis might have learned from the last war the impossibility of breaking men's spirit by terrorism. Instead they develop their 'lebensraum' and 'new order' by depths of frightfulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution." U. S. Dept. of State Bulletin, Vol. VII, No. 165 (Aug. 22, 1942), p. 709.

To this the President added, on Oct. 7, 1942, the following statement: "On August 21 I said that this Government was constantly receiving information concerning the barbaric crimes being committed by the enemy against civilian populations in occupied countries, particularly on the continent of Europe. I said it was the purpose of this Government, as I knew it to be the purpose of the other United Nations, to see that when victory is won the perpetrators of these crimes shall answer for them before courts of law."

"The commission of these crimes continues.

"I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

"With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to cooperate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

"The number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations. It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith." U. S. Dept. of State Bulletin, Vol. VII, No. 172 (Oct. 10, 1942), p. 797.

³² New York Times, Aug. 9, 1942, E5. Early in October, in a speech in the Berlin Sports-palast, Marshal Goering said there were more than 6,000,000 foreign workers and 5,000,000 prisoners under German charge. New York Times, Oct. 5, 1942, p. 2.

To its nationals who are internees in German-occupied territory, the British have sent supplies of food and clothing (through the International Committee of the Red Cross) and supplies of money (through the protecting Power).³³ So far as is known, forced labor has not been required of the several hundred Americans who, as of April, 1942, were in places of custody in Germany.³⁴ In May, 1942, it was reported that Americans were interned in Germany in heated buildings, that they received rations equal to those of German depot troops, and that they were permitted to have relatives visit them as well as to exchange mail with friends, and receive parcels, supplementary food and clothing.³⁵

The course of action followed by the United States Government has had regard for more than mere municipal law. In December, 1941, there were nearly a million nationals of Germany, Japan and Italy, fourteen years of age or older, in the United States and its possessions.³⁶ Early in the period of American participation in the war the United States Government took steps to secure humane treatment, on a reciprocal basis, of civilians in the enemy's hands. The enemy countries apparently assented to the proposal. For example, the Japanese advised the Red Cross delegate in Tokyo that for the duration of the war the Japanese Government would apply the articles of the 1939 Prisoners of War Convention to noncombatant internees of enemy countries.³⁷ As announced by the Department of State, the results of these efforts have been as follows:

Upon the entry of the United States into the war the Government of the United States with reference to its declaration to the British, French, and German Governments informed the German, Italian, and Japanese Governments that it intended on its part to apply the principles set forth in its declaration and in line therewith to apply to civilian enemy

³³ Parl. Deb. (Commons), Vol. 376, pp. 354-355 (Nov. 19, 1941).

³⁴ For a description of the places in which these Americans were kept, see *Revue int. de la Croix-Rouge*, No. 280 (Apr., 1942), p. 261. Certain other civilian internees in German hands have apparently been allowed to visit their families. *Ibid.*, No. 275 (Nov., 1941), p. 866. See, however, the press report of the suffering of certain American civilians reported to have been found by the Germans in occupied territory and interned in Germany. *New York Times*, Dec. 8, 1942, p. 5. For a report as to the treatment of Americans arrested by Germans in occupied France, see *Red Cross Courier*, Nov., 1942, p. 26.

In April, 1942, it was reported that a dozen Americans in Italy had been ordered to change their place of residence; they were to be *internés libres*, but four of them, finding themselves indigent, had requested internment. Before that time, there were reported to have been but two United States nationals in concentration camps in Italy. *Revue int. de la Croix-Rouge*, No. 280, p. 224 (Apr., 1942).

Up to Dec. 9, 1942, Germany had reported 1,491 United States civilians interned, including 788 men and 703 women. Italy had reported 21, of whom 13 were men and 8 were women. *New York Times*, Jan. 5, 1943, p. 9.

³⁵ Interpreter Releases, May 20, 1942, p. 200 (c).

³⁶ Official figures showed 934,100 German, Italian and Japanese aliens. Dept. of Justice press release, Dec. 6, 1942. See also, Donald R. Perry, "Aliens in the United States," *Annals Amer. Acad.*, Vol. 223, pp. 1-9 (Sept., 1942).

³⁷ *N. Y. Times*, Feb. 22, 1942, p. 3.

aliens as liberal a régime as was consistent with the safety of the United States. This Government declared that enemy aliens whom it might be found necessary to intern would be treated at least as favorably as prisoners of war. To that end this Government informed the German, Italian, and Japanese Governments that it intended to apply to civilian enemy aliens taken into custody by it the provisions of the Geneva Prisoners of War Convention, so far as those provisions might be adaptable to civilians, and that it expected the enemy governments to extend like treatment to American citizens taken into custody by them. The Italian Government replied that it would be glad reciprocally to apply the Geneva Prisoners of War Convention to American civilians interned by it. The Japanese Government replied that it would extend the provisions of the Convention reciprocally to American civilian internees *provided that the American Government did not make use of the provisions of the Convention to compel Japanese civilians in its hands to work against their will*—to which this Government agreed. The German Government stated that pending the completion of negotiations which were going on between the German and American Governments for the mutual repatriation of each other's nationals, it preferred not to undertake additional international obligations, especially since it hoped that it would be possible to substitute repatriation for internment. This Government replied that, as it had stated at the outbreak of the war, it did not desire to effect general internment of German nationals and preferred that citizens of the other country whose presence in either country appears prejudicial to the national safety should be repatriated. It added that pending the repatriation of German nationals held in custody in the United States the Government of the United States would in accordance with its previous declaration to the German Government apply to them the provisions of the Geneva Prisoners of War Convention and that it had taken note from reports received by it from official neutral sources that the German Government was apparently applying the provisions of this Convention to American civilians held in custody by it.³⁸

Immediately after this country became a belligerent, the United States Government took measures to make sure that its residents who were civilian alien enemies should not, on the one hand, be allowed to interfere with the war efforts, and, on the other, that they should not become the victims of short-sighted or misguided patriots.³⁹ The problem was described as that of

³⁸ U. S. Dept. of State Bulletin, Vol. VI, No. 152 (May 23, 1942), p. 446 (Italics inserted).

³⁹ The statutory authorization of executive action, which was in effect at the outbreak of the war, is as follows: "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to de-

keeping from "pushing people around" and at the same time preventing sabotage and other subversive activity.⁴⁰ Alien enemies were forbidden to travel without permission; they were not to possess firearms, short-wave radios, or cameras; they were not to enter certain prohibited and restricted areas. Later, the alien enemies were required to re-register and to procure identification certificates with photographs and fingerprints. Some persons who were technically enemies were in fact ardent supporters of the United States' cause. Regulations of the Department of Justice have provided that Austrians, Austro-Hungarians, or Koreans, registered as such under the Alien Registration Act of 1940, and not having voluntarily at any time become citizens or subjects of the enemy countries, shall not be considered "alien enemies" for the purpose of certain United States regulations.⁴¹ On October 12 the Attorney General ordered the removal, from the category of alien enemies, of Italian nationals,⁴² a move which would not take them out of

part therefrom, and to establish any other regulations which are found necessary in the premises and for the public safety." R. S. Sec. 4067; April 16, 1918, c. 55, 40 Stat. 531; 50 U.S.C.A., Sec. 21.

Among other things, presidential proclamations provided that alien enemies considered dangerous to the public peace or safety of the United States by the Attorney General or Secretary of War, as the case might be, were to be subject to summary apprehension. If so arrested, they were to be subject to confinement until they should have received such permits as should be prescribed. The Attorney General was given authority to exclude alien enemies from designated areas in continental United States, Alaska, Puerto Rico, and the Virgin Islands. The Secretary of War received similar authority as to the Panama Canal Zone, the Hawaiian Islands, and the Philippines. Proc. No. 2525, 6 Federal Register, p. 6321. See also Proc. Nos. 2526, 2527, 6 Fed. Reg., pp. 6323, 6324. These proclamations are printed in this JOURNAL, Supp., Vol. 36 (1942), pp. 236-243.

The President's proclamation of Jan. 14, 1942, prescribed rules and regulations for the conduct of resident alien enemies fourteen years of age or older. Such persons were required to apply for and acquire certificates of identification, the Attorney General being directed to provide for receiving such applications, for issuing the certificates, and for making the necessary rules and regulations. After the date fixed by the Attorney General for the completion of such registration, enemy aliens are required to carry the identification cards at all times. Proc. No. 2537, Fed. Reg., Jan. 17, 1942, p. 329; this JOURNAL, Supp., p. 54.

An Alien Enemy Control Unit was created in the Department of Justice on Dec. 15, 1941. Many of the detailed provisions in the regulations are summarized in the Department's publication entitled Questions and Answers on Regulations Concerning Aliens of Enemy Nationalities, dated May 15, 1942.

⁴⁰ 88 Congressional Record, A733 (Feb. 20, 1942), reprint of speech of James Rowe, Jr., Assistant to the Attorney General.

An official of the Federal Bureau of Investigation said in November that the aim of that organization and of grand juries was to be as zealous in protecting the innocent as in apprehending the guilty. New York Times, Nov. 13, 1942, p. 16.

⁴¹ Fed. Reg., Vol. 7, No. 28 (Feb. 10, 1942), p. 844, No. 38 (Feb. 25, 1942), pp. 1477-78.

⁴² Fed. Reg., Vol. 7, p. 8247 (Oct. 14, 1942). Also excepted were: "Former German or Japanese citizens or subjects who before December 7, 1941, in the case of former Japanese citizens or subjects, and before December 8, 1941, in the case of former German citizens or subjects became and are citizens or subjects of any nation other than Germany or Japan.

"Aliens of enemy nationalities during their term of military service in the armed forces of the United States." *Ibid.*

that classification except for certain purposes of municipal law and regulations. More than one hundred Civilian Alien Enemy Hearing Boards functioning in 86 judicial districts went about their task of examining and making recommendations as to whether particular aliens should be released unconditionally, paroled, or interned for the duration of the war. Final decision on each case rests with the Attorney General.⁴³

Comparison with action which the Government of this country took in the other World War is instructive. In 1917-1918, the United States interned fewer than 6,000 out of its alien enemy population, which included 480,000 Germans, and between 3,500,000 and 4,000,000 Austro-Hungarians. More than half of those apprehended were later released by a parole system.⁴⁴ At least after March 20, 1918, the Government separated civilian prisoners from prisoners of war.⁴⁵

Within six weeks after the attack on Pearl Harbor, 3,138 alien enemies had been apprehended, including 1,309 Germans, 243 Italians, and 1,581 Japanese.⁴⁶ By September the number that had been apprehended was 6,800.⁴⁷ By the end of the first year of American participation in the war as a belligerent the number apprehended had risen to 12,071, of whom 3,567 had been released by United States Attorneys after preliminary examination. Alien Enemy Hearing Boards had disposed of the cases of 7,627; of these, 3,646 were ordered interned for the duration of the war, 2,933 were paroled, and 1,048 were released.⁴⁸ In addition, many thousands of Japanese had been evacuated from Pacific Coast areas.⁴⁹

As to the general policy, Mr. Attorney General Biddle, in an address on June 6, said:

⁴³ The Department of Justice in its instructions indicated that the aliens were not entitled to these informal hearings before boards as a matter of right. An alien may not be represented by a lawyer at a hearing. A United States Attorney presents the Government's case.

⁴⁴ H. R. 2124, 77th Cong., 2d Sess., p. 27.

⁴⁵ W. E. S. Flory, *op. cit.*, 51, citing War Department, Annual Report, 1918, I, 190-191.

⁴⁶ New York Times, Jan. 18, 1942, I, p. 16 (reported statement by the Attorney General).

⁴⁷ New York Times, Sept. 23, 1942, p. 27. Reported remarks of Edward J. Ennis, Director of the Alien Enemy Control Unit, to International Association of Chiefs of Police. The speaker stated that 50 per cent of those apprehended had been interned, 35 per cent paroled and 15 per cent released.

⁴⁸ Attorney General Biddle's summary, Dept. of Justice press release, Dec. 6, 1942.

⁴⁹ Facts concerning this national defense migration are in the report of the Select Congressional Committee headed by Representative Tolan of California (cited in note 44, *supra*). Of the approximately 120,000 persons of Japanese ancestry who were evacuated, only a minority were Japanese nationals. An analysis of the measures which the United States took with respect to these removals is beyond the scope of this paper. Criticism of the policy, in so far as there has been criticism, appears to have arisen much more because the measures affected American citizens of Japanese ancestry than because they applied to Japanese aliens. For illustrative critical comments on the policy, see "Concentration Camps—U. S. Style," New Republic, Vol. 106, p. 822 (June 15, 1942); "Justice for the Evacuees," Christian Century, Vol. 59, p. 750 (June 10, 1942); Charles Iglehart, "Citizens Behind Barbed Wire," The Nation, Vol. 154, p. 649 (June 6, 1942).

Alien enemies with definitely bad records are arrested and interned. . . . Those suspected are given an opportunity to tell their own story before a civilian hearing board before the decision is made. For the others, the large number who have kept out of trouble, regulations are in force which safeguard the country in a situation in which we can afford to take no chances. They are registered and identified as alien enemies. They are forbidden to own certain dangerous equipment. Their travel is regulated. The control is pretty complete; but they are neither persecuted here, nor embittered.⁵⁰

Among the rules in force (as of May, 1942) for interned alien enemies were those which regulate subsistence, work, money allowances, communication with the outside world, and worship. The internees receive food, lodging, clothing and medical care. They may not be required to do work other than care of camp, etc., without their voluntary written request or consent. If they elect to do such work, and it is done for the United States, they are paid at the rate of eighty cents a day. If the work is done for another employer, the rate must be agreed upon in advance; it must not be less than the compensation for similar-type work done for the United States. An internee receives a small amount of spending money, in canteen coupons, whether he is a paid employee or not. Credits are entered for the respective accounts of the internees. There is a limitation upon hours of work. A civilian internee may have visitors twice each month, the names having been submitted in advance. In extreme emergencies, an internee may make short visits outside the camp, at his own expense, and accompanied by a guard. He may receive without quantitative restriction, mail and telegrams, subject to censorship. He is limited as to the number and length of messages he may send out, and may not include in them criticisms of the internment camp. Representatives of the protecting Power, of the International Committee of the Red Cross, of the International Y.M.C.A., and others permitted by the Provost Marshal's Office, may visit a camp, accompanied by the camp commander or his deputy. A clergyman who is an internee may minister in the camp; others may do so by permission.⁵¹

Certain places of internment maintained by the United States before this country became a belligerent have come to be used for the detainment of persons now alien enemies. There is evidence, in their administration, of respect for applicable rules.⁵²

⁵⁰ Speech before the Tennessee Bar Association. Dept. of Justice press release, June 6, 1942.

⁵¹ This summary is based upon the material in Interpreter Releases, Vol. XIX, No. 27, May 13, 1942, pp. 195-198.

⁵² Interpreter Releases, May 19, 1942, p. 198. Evidence of the scrupulous respect for rules is reported from Missoula, Montana, where hundreds of Japanese and Italians have been interned. There may be spent each day for subsistence of an internee an amount of money equal to that which is used in feeding an American soldier. That the point of agreement concerning prohibition of involuntary work on the part of the civilian internees is being observed under some difficulties is emphasized by the fact that there has been a shortage of agricultural labor in the region of the camp. New York Times, Aug. 4, 1942, p. 10.

Such incomplete evidences as are available seem to show that the enemy of the United States in the Far East has not been scrupulous at all times in the treatment of civilians within his power. Early in March, Anthony Eden in the House of Commons accused the Japanese of the most wanton cruelties against the civil population as well as military prisoners at Hong Kong.⁵³ About the middle of the same month the War Department in Washington published the first official Japanese list of American civilians interned, the list having come from Tokyo through the International Committee of the Red Cross.⁵⁴ From some sources came reports that the condition of such persons in Japan was fairly satisfactory,⁵⁵ but, with the carrying out of the plan for reciprocal repatriation of nationals, trustworthy accounts of a different type of treatment came to the American people. When the group of American diplomatic and consular officers, journalists, missionaries and others reached Lourenço Marques on their way back to America, journalists sent charges of Japanese outrages, including the torture of British and American civilians.⁵⁶ With the arrival of the *Gripsholm* at New York, these were supplemented by the accounts of eye-witnesses. In his first broadcast to the American people following his return from the Far East, Ambassador Grew gave specific instances of mistreatment.⁵⁷

The foregoing brief survey has had to do with the practice of some major States. Without further information from some of them and without including the practice of other important countries, such as Russia and China, no treatment of the present subject could be complete. In view of the inaccessibility of complete official records of the treatment of civilian alien enemies in the countries which have been referred to, it is difficult, and would be of little value to attempt now to draw any very final conclusions as to practice

⁵³ Parl. Deb., 5th ser., Vol. 378, pp. 930-932 (March 10, 1942). The charges received corroboration from the first woman to escape from Hong Kong (Phyllis Harrop), according to a Chungking report appearing in the New York Times for March 12, 1942, at p. 5.

⁵⁴ New York Times, March 16, 1942, p. 7. The list included 219 names; 90 were persons presumably in Japan when the war started, and the remainder had been taken on the island of Guam. By Dec. 9, 1942, Japan had reported 1,883 United States internees, including 1,596 men and 287 women. New York Times, Jan. 5, 1943, p. 9.

⁵⁵ According to a London dispatch printed in the New York Times of July 19, 1942, at p. 12, an International Red Cross delegate who visited two Japanese civilian internment camps at Shiroka Siroyama and Miyoshi Hiroshima in June described food and health conditions of internees at each camp as excellent. It had been announced some three months earlier that the Japanese Government had agreed to let representatives of the World Y. M. C. A. committee investigate the needs of Americans interned. New York Times, April 9, 1942, p. 3.

⁵⁶ See, especially, New York Times of July 25, 1942, at pp. 6, 7; *ibid.*, July 26, 1942, pp. 5, 7; *ibid.*, July 27, 1942, p. 1.

In a dispatch from Lourenço Marques, Joseph Dynan, Associated Press staff writer, referred to reports of continual saluting demanded of civilian internees by Japanese internment officials, also to an effort at Yokohama to include civilian internees as exhibits in street parades. Dallas Morning News, July 29, 1942, Sec. I, p. 2:3.

⁵⁷ U. S. Dept. of State Bulletin, Vol. VII, p. 719 (Aug. 29, 1942).

during the present war. As to the law, it is evident, even from a brief investigation, that there is less specific protection under international law for civilian than for military prisoners. The assimilation of the former to the latter for the purpose of trying to improve their lot is, under the circumstances, a humanitarian move.

As a practical problem, the treatment of civilian alien enemies will inevitably be affected by the exigencies in which a belligerent finds himself. The same is true as to prisoners of war. In the case of either category of persons, a system of permissive restraint without unnecessary cruelty or reprisals is, in general, the object of such international law as now exists on the subject-matter. It would appear that, despite the understanding obtained for the purpose of assuring minimal protection, there have already been some acts on the part of enemies of the United States which are irreconcilable with elemental principles "as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."⁵⁸ The arrangement which the United States has made with its principal opponents in this war concerning the treatment of civilian alien enemies will not prevent breaches of the agreed rules, but will help to focus attention upon such illegalities, and upon the general creed which has inspired them.⁵⁹ By undeviating adherence to the commitment, the United States can furnish further evidence to the world of its belief in the dignity of human personality and its adherence to principles of humanitarianism in the midst of the conflict of arms.

⁵⁸ Preamble of Hague Convention IV of 1907, 36 Stat. (Pt. 2), 2277.

⁵⁹ A recent suggestion of that creed occurs in certain remarks of Propaganda Minister Joseph Goebbels, broadcast in German and recorded by the New York Times. As translated, they included the following: "The bourgeois era of false ideals about humanity is past, and a hard century has come into being. It is not mastered by squeamishness, but only by manliness and strength." New York Times, Sept. 3, 1942, p. 4.

THE PLACE OF LAW AND COURTS IN INTERNATIONAL RELATIONS

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I

Few periods of history disclose less harmony, mutual respect and trust among nations than the present. It may therefore seem inappropriate in such an atmosphere to discuss the place of law and courts, since they can function effectively only in periods of relative stability. Yet the very fact that international law is in some respects passing through a depression may sharpen our perspective and emancipate us from the illusions of the recent past. We may get a better grasp on realities and more correctly gauge the prospects for an ordered international life.

It is important to reexamine our position at this time because lawyers and economists are now seeking earnestly to devise systems of legal and economic regulation which shall prevent another such débacle as now afflicts the world. In the process the lawyers seem less realistic than the economists, for they appear to be devising prescriptions purporting to outlaw the use of force by a single nation-State, while endowing what they call a centralized authority with the sole power to command the use of force against a recalcitrant State, called an "aggressor" or some other opprobrious name. All the "good" States are expected to join in the hue and cry, although it is unclear how the facts are to be determined, how a difference of opinion among the States is to be avoided, how States are expected to abandon political considerations and submit to outside guidance in determining the occasions for the privileged and unprivileged uses of force.

In the belief that such a suggested system contemplates renewed rainbow-chasing, that it overlooks the experience of the recent past, and that it holds out promises not of order but of new disasters, an attempt will be made to take stock of our current position, to trace the limits of law as a social control in international relations, to examine the possibility of external control of the use of national force for national purposes, to propose certain reforms which might appear practical of adoption and which might mitigate the incentives to conflict. At least a realistic diagnosis may help to mould the therapeutics to the reasonably achievable.

II

International relations are a product of history, and reflect the changing needs, ambitions, capacities, philosophy, ideals and accidents, of circumstance and leadership, which mark the progress of man through the ages.

Whether it was wise to develop the national State, with all its current characteristics and physical inequalities, may be pretermitted. It just grew naturally and through the necessities of life had perforce to enter into relations with other similar groups. The increasing facilities of communication and transportation may have tightened this loose bond, but propinquity has not notably improved international relations nor weakened those forces which have made of the national State the largest unit for internal security, prosperity and peace which modern man has been able to create.

Yet in the quest for these advantages he has adopted policies and practices, internal and external, which have brought his group into competition and conflict with other groups seeking the same cherished goals of well-being. Thus, while acting entirely within its legal rights, each nation adopts whatever tariffs, armies, navies, airfleets, immigration or commercial policies, it deems best suited to its needs regardless of what disadvantage or humiliation this may inflict on competing nations. This alone may indicate (1) that the major sources of international resentment are economic or political and not legal in character; (2) that they involve no question of legal right or wrong; (3) that by acting entirely within a State's legal rights and within its own jurisdiction—within the *domaine réservé*—one may impose the greatest damage on others; and (4) that if courts passed on such questions from the criterion of current international law they would, by necessarily sustaining the privilege of such discriminatory conduct, merely rub salt into open wounds. Thus, at the very outset, we are met by the fact that international law permits, if you will, or fails to reach some of the major sources of international resentment.

When there is added to these domestic privileges the external instruments of unfair competition, in the political and economic spheres, accentuated and often explained by the marked divergence among States in territory, population, resources, power and influence, we may appreciate the narrow limits within which customary law or even treaty has opportunity to function—in spite of the growth of commerce and administrative unions. The competition of States, quite apart from the coincident economic nationalism, is rooted in high politics, which knows but few rules. If in this unique system shipwreck is to be avoided, it calls for wisdom, judgment, self-restraint, negotiation, conciliation, adjustment, but hardly for a profound knowledge or application of law.

When to these exacting qualities of statecraft, now by reason of limited horizons, insufficiently employed, there are added the many factors making for mass movements—biological, psychological, historic, economic and social—one may realize the shortsightedness of the view that international law controls the whole international scene, and in the light of the natural predominance of politics in the competition, the futility and ineffectiveness of a proposed rule of law that “force may be legally used by states only for purposes for which its use is approved by international law, *viz.*, self-defense and

the enforcement of obligations on behalf and by authority of the community of states," whatever that may mean. Such well-meant prescriptions, by ignoring the fundamental facts and factors making international relations what they are, seem both sterile and dangerous, for while leaving the provocations to force untouched they merely purport to outlaw the resulting manifestations.

Much harm has been done, in our humble opinion, by those who would endow international law with the machinery of municipal law, by purporting to have created and then assuming the existence of a central world authority whose edicts must be obeyed by the member States, and, such authority failing, would grant a combination or coalition of "good" States the power to coerce and suppress the "bad." This again ignores the hard facts of life. While much has been made of the analogies between international law and municipal law, the differences are even more striking. Their subject-matters—quite apart from their methods of creation and application—are entirely different, so that neither the same principles nor the same rules can apply. International law presupposes a constellation of so-called independent States which are not bound to subordinate themselves to any central authority and, apart from the general rules of customary law, are not bound at all except for their own agreement. In nearly every particular—except for the human propensity to differ and quarrel—this system differs from that of municipal law. *Within* the State there is a central authority to whom all lesser groups and individuals are necessarily subordinate. Under normal circumstances, their opportunity to resist the central authority is denied by the fact that they have no arms, no army, must submit to arrest and trial and may be coerced and punished by the central authority.

✓ The erroneous belief that only such a closed and mature system deserves the name of law and that since international law lacks some of these elements, like societal arrest, coercion and punishment, it must therefore be endowed with them, has proved tragic. The romantic demand for central enforcement, diluted by disillusioning experience to special-group force, has helped to split the world into irreconcilable camps and will, it may be feared, continue to have that effect, with all its consequences, until a more realistic view prevails. To try to make force legal by internationalizing it—converting politics into law—has promoted both the quest for alliances and revolts from the system, since control of the group-force becomes a major goal of politics and the losers will quit and set up a rival group. International law ✓ is a normative and not a punitive system; the effort to make force and enforcement the kernel or criterion of its virility is to overestimate the function of force in a municipal system and to underestimate the enduring factors which have induced observance of international law. The attempt to make obedience to international law—or policy disguised as international law—conform to the mechanism of municipal law, by conjuring up an impossible "international police" or inventing an imaginary "collective security," sup-

ported as it is by revival of the discredited and unworkable theory of the "just war," suspends the threat of war over every disfavored nation and makes a resurrection of international law, not to speak of international peace, exceedingly difficult, if not impossible. Uneasiness and distrust among nations are thereby perpetuated.

As a matter of fact, the function of force in society has attracted undue attention. Force in municipal law is tempered by many factors which relieve the social strain and tension. Legislation and administrative action continually ameliorate tensions and redistribute social advantages and risks in order to avoid tensions, thus making the resort to force unnecessary. If too distasteful to public opinion, an unwelcome law may be repealed or disregarded, rather than enforced. Many groups in the community, like labor, possess political power which gives them numerous exemptions from the rules controlling individuals and accords them a considerable sphere of self-government. The State avoids coming to grips with these groups by compromising with them to create a special status. Force is not used against them. But even if the State may be said to monopolize force, that has hardly prevented civil wars, which were common even in the rather orderly progress of the nineteenth century. A wise statesman has remarked that international wars will cease when civil wars end. Force internally is thus neither all-pervasive nor rigidly effective; the more civilized the State, the less is it noticeable.

In international relations force can play even less of an institutionalized rôle. The inability to solve the demands of the dissatisfied invites not a resort to group-force but to the ameliorative, conciliatory processes manifest in the relations of capital and labor—a resort not to law but to bargaining. While self-help may seem relatively primitive and be deprecated, the occasions on which it is employed for law enforcement have been relatively rare and minor. Certainly, since an international police or community force is impractical, the substitution of the arms of a group of States is more likely to incite group conflicts and great wars than it is to produce tranquillity and peace. Self-help, which is exposed to the glare of public opinion and is likely to be restrained by criticism, offers nothing like the social danger represented by theoretical group-force, even the threat of which gravely impairs the hope of fruitful coöperation in the economic and political field. Thus, the attempt to create centralized force in international relations not only fails on the ground of superficiality and impracticability, but by degeneration into the force of a dominant group results in armed alliances more dangerous than the pre-1914 position, which had admittedly to tolerate political self-help while endeavoring, not seriously or effectively enough, to remove or minimize the occasions for its exercise. Yet herein lies the line of progress.

Even if we cannot guarantee the elimination of war from human affairs, the amelioration of some of the main causes and occasions for conflict, concurring with the growing realization of the costliness of the enterprise, may persuade

the governing nations to meet these political problems in a conciliatory spirit, measure unemotionally the nature of the disorder and the grievance and make the necessary concessions to facts. To postpone or skirt this process until an international assembly or council obtains a preponderance of force behind its decisions is to accentuate the difficulties in the problem, invite desperation and indulge in hopes not consistent with the existence of national States. The nineteenth century was marked by negotiation of differences and the Concert of Europe. Why not build on that tradition of constructive conciliation, with modern improvements taught by experience, instead of trying to build new institutions that have no roots in history, have proved their futility, and in the opinion of qualified statesmen invite anything but hope?

III

International law follows the facts of life even more closely than does municipal law, which by exception can occasionally venture upon commands, without prior experience. Witness prohibition. But even more than municipal law, new international arrangements dare not go further than the political mores justify without inviting a débacle. Without suggesting that many factors may not coöperate to induce respect for law, even in time of war, it may be said that new restraints, such as a protocol at Geneva, a Kellogg Pact at Paris, have just as much chance for success—even if the Pact meant what optimists assumed—as the cold facts of political life permit. Those facts disclose a marked conflict of interests, political, economic and social, which admits of little hope that international law, which depends so largely on mutual respect and trust, will soon be restored to its nineteenth century influence and prestige. The Hague Conferences symbolize the high-water mark of the trend toward harmony. Law's potentialities for the future depend upon a recognition of its limitations, upon a deflation of the economic sources of conflict, upon a stabilization of international relations, upon a restoration of that mutual trust which a threat of coercion by any dominant group renders abortive. To institutionalize group-force, likely to develop into the force of momentarily dominant nations, is a disservice to harmony and a disturber of the peace. It will need infinitely more than a proscription of the use of force by single nations to make international relations again workable. We are handicapped by the facts that group and individual morality are very different; that only the rudiments of ethical thinking find a place in politics; and that groups are not notably endowed with a conscience.

International relations are likely to reflect the state of domestic relations. When relative stability obtains in the internal affairs of States, the willingness to coöperate internationally is encouraged and enhanced. In these revolutionary times, when new doctrines concerning the place and power of social classes have brought instability and uncertainty to many States, the willing-

ness to coöperate is discouraged and impaired, at a time when both the internal and external instruments of unfair competition need greater international regulation than ever. Anything which discourages that willingness to coöperate is a misfortune. To those handicaps which nature and the times have provided, doctrinaires should not add further fuel.

Here also a lesson may be found in recent experience. The arrangements for holding down the *status quo* of 1919 presupposed its relatively satisfactory character. When it proved to be out of harmony with economic considerations or political facts, the attempt to enforce the disequilibrium was anything but constructive. If politics are to be institutionally controlled, the quest should be for instruments of ordered change, not for the enforcement of the *status quo*. The "enforcement of peace" is a contradiction in terms, rests on unsound premises, manifests confusion of mind, and will, it is believed, continue to end in a morass of failure.

IV

The weakness of international law and the resulting necessity to be modest in demands and to tread gingerly, is conditioned by the fact that it deals with so-called sovereign, independent States. That means an idealization of the national State, an absence of any central authority, the futility of external command, the danger of attempted compulsion as against the efficacy of persuasion, the limited scope and power of any international institutions, like conferences and courts, that nations may be persuaded to create. The bulk of those national policies, internal and external, which so deeply disturb international relations are not affected or touched by international law as we now know it. If it is hoped to make them so, a new atmosphere of coöperation, of congeniality to voluntary surrenders of national prerogatives, must be created. Yet this atmosphere is utterly inconsistent with the demand for group-force, for sanctions against "aggressors" or disturbers of the *status quo*, demands which not only militate against that trust which conditions coöperation but which invite conflict and war, since nations always split on such ideological issues. In view of the nature of international differences, neither party to a quarrel is likely to be wholly right and the position of outsiders is likely to be based on innumerable considerations other than legal.

It is in theory conceivable that a *Pax Romana* may result from this war in which one nation or group of nations may unify the world by force. That nation or group would then create a new form of international law, commanding, coercing and enforcing the new peace. That presupposes the end of the national State as now known, and is a result hardly to be anticipated. But the notion of enforcing the decrees of a central authority is consistent only with a *Pax Romana* and not with a congeries of States enjoying theoretical or legal equality. The only alternative might be the equally unanticipated voluntary surrender to a central authority of all or some of the indicia

of national sovereignty, such as armies, navies and jurisdiction over commercial and immigration politics, etc. But such a voluntary surrender will be unobtainable so long as the threat of group-force hangs over States not in control of the instruments of centralized power, or so long as it implies obligatory national disarmament.

Certain other facts must be observed. Even at the high point of the period of harmony, that of The Hague Conferences, States which committed themselves to arbitration limited its scope to "legal" questions and rigidly excluded from the obligation the submission of questions of "vital interest." Even though the phrase has been dropped, it is evident that there are political questions which States can hardly be persuaded to submit to the determination either of a selected body of arbiters or presumably to any international authority. They would doubtless decline to sign treaties impairing such "vital interests." States as now organized, the accidental products of history in a competitive world, reserve from external control certain interests, such as the size of armaments, their commercial and immigration policies, which they deem "vital." These are not legal in character, and issues concerning them are appropriate to conciliation, not adjudication. Indeed, it is possible to do courts an injury by exposing them to the requirement of adjudicating political issues, even when clothed in the guise of legal questions, as is evident in the decision of the Permanent Court of International Justice in the Austrian Customs Union case.

Nor is the absence of legislation in international relations a major weakness. States have learned to cooperate by treaty in hundreds of fields when the need arose. The perception that the prospective unfair competition must be met by international agencies should induce more cooperation—provided an atmosphere of trust is recreated. Legislation is needed within the State because the changing needs and demands of millions of people organized into groups require continuous adjustment. The needs, demands and inter-State relations of nations are relatively few and more stable and require no constant readjustment. The international agencies dealing with special problems, like the production and distribution of particular commodities, are the subcommittees for "legislation," and treaties, bilateral and multilateral, the expression of legislative cooperation.

V

Thus, the very existence of national States conditions the limitations which must be set on the claims of law and the opportunities for courts. Only a voluntary deflation of sovereign claims, under the realization that self-interest demands such abdication, can strengthen international economic controls, law or peace. The method of group sanctions has been tried and found catastrophic. But the voluntary deflation here suggested must be cultivated in the soil of understanding hardly in evidence during recent years. The fears for national self-sufficiency induced by the present war and

the unprecedented measures recently recommended to the American Republics to wipe out the *private* economic interests of disfavored individuals, national and alien,¹ hardly strengthen our faith in international concord or our reliance on the freedom of access to raw materials and capital, even your own, in time of stress. This economic warfare may have dangerous repercussions in the post-war economy and militates against any revival of mutual trust and, therefore, against voluntary concessions from sovereignty. If, as seems likely, national self-sufficiency will now be more eagerly sought than ever, the chances for any surrender of sovereign claims and for establishment of international controls of unfair competition do not seem bright.

Indeed, new types of imperialism may be in the making. The very regimentation which present internal developments have produced, even in the United States, creates a dynamism which can only with difficulty be restrained at the frontiers. Now that the State is in business, notably the international banking business, and is so largely conducting or controlling foreign trade, there seems greater danger than ever of misunderstandings and collisions between these national entities, including lender and borrower. What was formerly commercial is now political. When there are added the fears caused by the threat of shortages in vital raw materials and the concomitant desire to assure a reliable supply, we have the makings of a conflict over the national control of foreign raw materials, demands for a widespread closed economy from which foreign imperialisms are to be excluded, and a subserviency, if not indeed political extinction, of many small States. This would hardly be a climate propitious for the development of law or courts.

VI

These difficulties, created by the facts and not by the law, indicate the therapeutics. They call first for men of vision, understanding and tolerance who will not regard international relations as a morality play but as a jungle of diseases, economic and political, which have all but killed the patient. This sick world needs physicians, not theologians or moralists, however deeply it may have fallen under the sway of obnoxious despots. The disease of international conflict, which under the present dispensation is inherent in the system of national States and international relations, must so far as possible be treated at the source. Only by deflating the major causes of conflict can there be a hope that law and stability among States can or will develop. No part of such a program will be easy, but first of all an atmosphere for co-operation must be created. That coöperation lies primarily in the economic and social field and to that end lawyers can be useful, it is believed, in three ways: (1) by facilitating the work of the economists through voluntary arrangements among States, persuading them to remove the political obstructions which have clogged and finally broken down international relations;

¹See Recommendation No. VII of the Final Act of the Inter-American Conference on Systems of Economic and Financial Control, Washington, June 30-July 10, 1942.

(2) by assisting the growth of law by refraining from the advocacy of sanctions or force against the momentarily disfavored, a system not congenial to international relations and devastating in its effects; and (3) by establishing a workable system for peaceful change.

As to (1), we must assume an intelligent and viable peace which shall put an end to economic warfare, as demanded by Mr. Leo Pasvolsky of the Department of State in certain public documents.² That being assumed, it may be possible to persuade nations in their own self-interest to establish international agencies, like the International Labor Organization, in the field of tariffs, foreign banking, exports and imports, migration, commercial policy, which would first be limited to the power to recommend and, if their value were proved, might later be entrusted with a larger measure of control. International marketing cartels and working agreements constitute a private or unofficial means of relaxing the tensions of national economic competition, and if controlled in the public interest, may be deemed a commendable groping in the right direction. As the major diseases are brought out of the jungle into the hospital, perhaps rules can be worked out inductively for tempering the conflict of interests, creating administrative and legal institutions to which the nations will turn in preference to war.

(2) International law, like public law generally, is more unstable and precarious than private law which has behind it a long habit, legislation and courts. It governs private individuals and corporations who have in theory little political power to defy the rules, although the State must make its compromises with important groups in the community. International institutions, such as courts and conciliation agencies, must deal even more delicately with States, whose susceptibility is nurtured in a long history of arbitrary power. The attempt to create coercive machinery out of the materials of international relations, by which some States would be judges, mentors or controllers of others, especially Great Powers, whether called "collective security" or by any other name, is a technique of war and potential war which impedes the possibility of any useful coöperation.

International law is a system of normative rules, developed most actively from the seventeenth century to the early twentieth, which obtain their sanction not by force but by practice and cultivation among governmental authorities—state executives, ministers of foreign affairs, other public officials, and notably international tribunals of various kinds. Narrow as may be its scope in the total complex of international relations, and in constant danger of submersion or violation by politics, it nevertheless controls a vast field of human activity and is universally invoked both by governments and by individuals affected. Few violations escape public notice, and while the sanc-

² "The United States in the World Economy, 1940: Some Aspects of Our Foreign Economic Policy," address delivered Dec. 30, 1940, printed in Department of State Bulletin, Jan. 11, 1941; "The Problem of Economic Peace After the War," address delivered March 4, 1942, published by Department of State as Publication 1720.

tions necessarily differ from those of private law, they nevertheless operate with considerable efficacy. States may differ as to what is the rule of international law, but no State would ever assert exemption from its control. It even governs, primordially, the conduct of war, recognized as a social disease which States have endeavored, by treaty arrangement, to limit or prevent. Strange to say, while self-help must occasionally be tolerated in this somewhat primitive system and is by no means the baseless evil which some theorists have supposed, the attempt of third States to compel the so-called observance of international law, to coerce the stigmatized delinquent, acts as a blight and withers that trust among States which alone furnishes the soil for the development of coöperation and law. Chief Justice Taney understood the dangers of coercing a State in so simple a matter as interstate rendition among the states of this Union. So did Hamilton and Madison in rejecting any suggestion that states might be coerced by the Federal Government to perform their constitutional duties. There was a political reason for the incorporation of coercion in the Versailles system, but this should not mislead students of international affairs. If, after a preliminary period for stabilization of the forthcoming peace, organized coercion should be included as a means of "enforcing peace," there will be a constant effort of the disfavored to revolt from the system. Being of a peculiar type, international law weakens in the face of attempted group enforcement, which would more than likely have political reasons and evidence the predominance of politics.

As already observed, most conflicts of interest among States are not based on legal rules, but go much deeper. They cannot be stated in legal terms; they therefore defy legal analysis and they cannot be adjudicated, only adjusted. Here lies the great field for future development; in time, the principles used in the adjustment of non-legal conflicts may, by reiteration, develop into rules of law. But up to the present, law as a social control in international relations affects only specific matters like war—a unique subject of regulation—and jurisdiction, intercourse, extradition, claims, and remedies, the issues arising out of which, when not settled by negotiation, are susceptible of submission to courts if States are willing. To recreate that atmosphere in which willingness to submit will seem natural is part of the function of lawyers in all countries. Again the admonition is appropriate to avoid all temptation to provide for enforcement of decisions, a matter which has never presented a serious problem. Whether the Permanent Court of International Justice can be reestablished depends on political developments. It would be desirable if it were, for on the whole its efforts were constructive. A congenial political atmosphere is a condition for the creation of any courts, even bilateral, and that, we may hope, will develop. Perhaps States may sometime be willing by treaty to permit their nationals, injured abroad in violation of international law, to pursue their claims before international tribunals, under conditions safeguarding the interests of the two States concerned.

(3) An equally important requirement, in which both law and courts can play a constituent part, is the peaceful modification of political conditions no longer appropriate. This is perhaps the most difficult innovation to accomplish, but it also is premised upon the renewal of trust and respect and the rejection of any threat of outside force. It also exemplifies a fundamental difference from municipal law, which by legislation with majority vote can effect changes in polity which circumstances require. Not so in international law, where the premise of legal equality requires unanimous consent for treaty change, a consent almost sure to be declined by the party deleteriously affected. This defect rendered Article XIX of the Covenant sterile. Since change is the law of life, since no *status quo* can long be satisfactory to the disfavored, there are only three courses open—to accept the misfortune and harbor the resentment; to seek by negotiation to secure some recognition for the claim to change; to seek by force to accomplish what reason or persuasion could not. History is full of illustrations of all three methods, notably the last, and nothing whatever is accomplished, except to intensify the venom, by denouncing the restless or ambitious. As Carr says, there is no moral difference between him who would by force hold down an unhealthy *status quo* and him who wishes to change it. The difficulty lies in devising the machinery which could handle such a problem, a tribunal or body which could be so impartial, so wise, so much trusted as to persuade nations to abandon the unanimity rule and accept the judgment of such a body as preferable to conflict. In truth, the Concert of Europe practised such a system during the nineteenth century, and while it affected mainly the fate of small States, it exemplified the advantages in politics of negotiation, compromise, and flexible statesmanship over mechanized institutions. In administrative unions the unanimity rule has been found unworkable; whether it can be modified in political matters, especially when affecting important States, remains to be seen.

While no guarantee can be given that States will at all times consider their "vital interests" better protected by negotiation than by war, the willingness to enter direct negotiations, if necessary, to discuss the sources of friction before regional conferences, and a wise concession to facts by the conferees, would do much to narrow the area of conflict and the assumed necessity for a gamble with war. The very destructiveness of the institution, crippling whole nations for indefinite periods, is a deterrent to trial by battle if other recourses are available. But it is not believed that an institutionalized combination of nations can, by their force or threat of force, except against the weak, reduce the area of conflict; on the contrary, such an alleged protection against "aggression" will very likely only enlarge the area and render international relations hopeless.

Equally important, and incidental to the larger question, is the revision of treaties. No treaty should be deemed to have permanent sanctity and every treaty should allow for its termination or modification at the request of

either or any party within a given number of years. Perhaps this should be deemed a matter of common law. At all events, since change of circumstances is constant, provision should be made to allow a party, as a substitute for the current lawless yet often justifiable or irresistible temptation to unilateral abrogation, to proceed before an international tribunal or disinterested political body for a declaratory judgment that a change of conditions warrants release from the obligation. Such a rule of procedure has now been incorporated in Anglo-American municipal law and it is ideally adapted to international relations. The rule of *rebus sic stantibus* recognizes the problem, but affords no procedural solution. International law now provides numerous rules for determining the effect on treaties of certain territorial changes. The problem needs further exploration to accommodate the modification in treaty obligations caused or warranted by other types of changed circumstances. Here international law, given the conditions essential to the growth of law, can regularize a haphazard and disturbing political practice by supplying the procedure for making a political demand at least partly justifiable. Whether it could deal with major claims to alterations in political power may be doubtful, but the removal of even some occasions for conflict should not be underestimated. Arbitration and conciliation have been developed to become a useful adjunct of government; treaty revision by way of release should be recognized as the fundamental problem that it is.

VII

Perhaps this matter of revision will have exemplified several of the theses for post-war relations which this article has undertaken to emphasize. To summarize, the nature of the national State and its relation to others is such that the competition among them for place, power and prosperity calls for a high degree of conciliation of conflicting interests; that only by persuasion and appreciation of self-interest and not by force can these disparate States be induced to create those international economic and social agencies which must help to temper, reconcile and adjust the unfair competition; that an atmosphere of harmony, trust and mutual respect is indispensable to progress; that the threat of group-force stifles such an atmosphere; that law plays only a minor part in international social control; that international law cannot be endowed with the instrumentalities and machinery of municipal law; that the attempt to organize sanctions has been shocking to intelligent relations and to human welfare; and that a renewed effort to "enforce peace" can only result in another débâcle. The attractions of organized force, so inherent in municipal law, must be rigorously repudiated in the field of international law and relations to which it is totally unsuited. Otherwise, before the present catastrophe has wreaked all its desolation upon the human race, we stand on the brink of new disasters.

RECENT INNOVATIONS IN LEGAL AND REGULATORY CONCEPTS AS TO THE ALIEN AND HIS PROPERTY *

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The present totalitarian war and the emergency situations which preceded it and which are following in its wake have caused the creation of many new concepts which perhaps owe their basis to the theory that in the conduct of foreign affairs and in the conduct of war the executive arm of the government must be unhampered. In several recent cases the United States Supreme Court has held¹ that under the Constitution the conduct of foreign relations is committed to the political departments of the Federal Government, and that the propriety of the exercise of that power is not open to judicial inquiry. However, it is now equally well settled that where a conflict of property rights under statutes and treaties is presented, the determination of these rights by the executive department is subject to review by the courts.² The doctrine excluding from judicial inquiry the conduct of foreign relations by the political departments of the government has encouraged the creation of concepts which permeate the entire field relating to the alien and his property.

The first basic statutory enactment relating to the subject is a statute of July 6, 1798, called the Alien Enemy Act.³ This Act as now amended states that whenever war is declared between the United States and any foreign nation or government, or invasion or predatory incursion is perpetrated, attempted or threatened against territory of this government, and the President makes public proclamation of that fact, all "natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies." This Act also gives authority to the President to direct the conduct to be observed on the part of the United States toward those aliens. It is by virtue of proclamations under this Act that alien enemies are now interned, and it is under this Act that the President

* Revision of an Address delivered before the 65th Annual Meeting of the American Bar Association at Detroit, Mich., Aug. 24, 1942.

¹ U. S. v. Pink, 301 U. S. 203; 62 S. Ct. 552, 562; this JOURNAL, Vol. 36 (1942), p. 309.

² Willoughby, Constitutional Law of the United States, 2d ed., § 855, p. 1336; Jaffe, Judicial Aspects of Foreign Relations, p. 233; *The Florence H.*, 248 F. 1012; U. S. v. Watts, 8 Sawyer 370; U. S. v. Rauscher, 119 U. S. 407; *Tartar Chemical Co. v. U. S.*, 116 F. 726; *Banco de España v. Federal Reserve Bank*, 114 F. (2d) 438, 442.

³ 1 Stat. 577; 50 U.S.C. 21.

now directs the conduct to be observed on the part of aliens in relation to their travel, registration and possession of certain articles.

The next basic statutory enactment in relation to enemy control is the Trading with the Enemy Act of October 6, 1917.⁴ It is by virtue of an amendment⁵ (May 7, 1940) to Section 5 of the Trading with the Enemy Act that the President has issued executive orders under which the so-called freezing regulations have been issued by the Treasury. Section 5 (b) of the Trading with the Enemy Act was amended December 18, 1941, by the First War Powers Act.⁶ Section 301 of the latter Act grants to the President during time of war or during any other period of national emergency declared by the President, the right, by means of instructions, licenses or otherwise, to investigate, regulate or prohibit foreign property transactions. That section likewise declares that any property or interest of any foreign country or national shall vest in such agency or person, at such time, and upon such conditions and terms, as the President may prescribe, and that such property may be used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

These statutes are the basic provisions of law governing the alien and his property. However, because of the expression "alien enemy" in each of these statutes or the regulations issued thereunder, much confusion and many new concepts have arisen as to the meaning and definition of an "alien enemy." In the first Alien Enemy Act of 1798 the expression is used to include "all natives, citizens, denizens, or subjects of the hostile nation or government."⁷ Under this statute these are the persons regarded as "alien enemies" subject to restraint.

The invasion and absorption of Austria by Germany has created a novel and interesting question, to wit, Are Austrians natives of Germany and hence enemy aliens? The State Department, as announced by Secretary Cordell Hull,⁸ regards Austria as not having been legally absorbed into the German Reich. However, Judge Conger, in the United States District Court, Southern District of New York, recently held in a very interesting opinion that Austrians may be properly apprehended and interned.⁹ In determining this question, the court had no concern whether the Austrian alien was a citizen of Germany under German law, but founded its reasoning upon the fact that the relator in the proceedings was born in Austria, which today is a subject state of Germany and within the territorial limits of the

⁴ 40 Stat. 411, U. S. Code, Appendix; this JOURNAL, Supplement, Vol. 12 (1918), p. 27.

⁵ 54 Stat. 179; this JOURNAL, Supplement, Vol. 35 (1941), p. 213.

⁶ Public Law 354, 77th Cong., 50 U. S. Code, Appendix, § 616; this JOURNAL, Supplement, Vol. 36 (1942), p. 56.

⁷ Under the Selective Service Regulations, ed., Commerce Clearing House, 18601.02, the term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an enemy alien of the United States.

⁸ See Department of State Bulletin, Aug. 1, 1942, p. 660.

⁹ C.C.H. War Law Service 9729.

German Reich. Accordingly, since the nativity of the relator is determined by his place of birth, which presently is within Germany, the court held that he is a native of Germany and, therefore, an enemy alien within the purview of the Alien Enemy Act. The Attorney General, however, in a regulation issued by him on February 5, 1942, has permitted Austrians to be exempted from the regulations with regard to travel, although expressly reserving the right to apprehend them under the Act of 1798.¹⁰

An "alien enemy" is defined under the Naturalization Laws and the regulations issued thereunder,¹¹ so as to include natives of an enemy country notwithstanding that since birth they may have become citizens or subjects of a nation with which the United States is not at war. However, on March 20, 1942, based upon the Nationality Act,¹² Executive Order No. 9106¹³ excepted from the classification of "alien enemy" certain persons whom the Attorney General of the United States, for the purposes of permitting them to apply for naturalization, shall, after investigation fully establishing their loyalty, certify as persons loyal to the United States. So, therefore, here we again find a new concept of "alien enemy," based upon the test of loyalty.

The same concept of loyalty is to be found in the Final Act of the Inter-American Conference on Systems of Economic and Financial Control, held at Washington from June 30 to July 10, 1942, under the chairmanship of Edward H. Foley, Jr., at that time General Counsel of the Department of the Treasury.¹⁴ That conference recommended that the application of economic and financial controls of the American Republics "should have as one of its objectives the control of the property and transactions of all persons, real or juridical, residing or situated within their respective jurisdictions, regardless of nationality, who, by their conduct, are known to be, or to have been, engaging in activities inimical to the security of the Western Hemisphere."

The concept of "alien enemy" as found in the Trading with the Enemy Act (1917) is based upon residence. Section 2 of that Act defines the term "enemy" as including any individual, partnership or other body of individuals, of any nationality, resident within the territory of any nation with which the United States is at war, including that occupied by the military and naval forces, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory, or incorporated in any territory other than the United States and doing business within such territory. By said section the President may bring within the purview of that definition any other persons, natives, citizens or

¹⁰ C.C.H. War Law Service 8051. On and after Oct. 19, 1942, citizens of Italy were declared exempt from complying with the regulations relating to curfew and travel. C.C.H. 9743.

¹¹ See Federal Register, Dec. 17, 1941, Vol. 6, No. 244, pp. 6450, 6451.

¹² 8 U.S.C. 726, subdivision d; this JOURNAL, Supplement, Vol. 35 (1941), p. 79.

¹³ Federal Register, March 24, 1942, Vol. 7, No. 57, p. 2199.

¹⁴ See Final Act published by the Pan American Union, Washington, D. C., 1942, Congress and Conference Series No. 39, p. 16; also in Supplement to this JOURNAL, p. 9.

subjects of countries with which the United States is at war, except citizens of the United States, regardless of residence or wherever doing business if he finds that "the safety of the United States or the successful prosecution of the war shall so require."

That the definition of "enemy alien" as found in the original Trading with the Enemy Act is still operative was emphasized by the action of the Supreme Court of the United States in *Ex parte Colonna*.¹⁵ In that case, on January 5, 1942, the court, on the basis of the definition of "enemy" contained in the Trading with the Enemy Act, held that the Ambassador of the Italian Government was not authorized to bring an action. The language used by the Supreme Court of the United States in holding that an alien enemy could not sue caused considerable confusion. But this confusion was largely removed by the bulletin of Attorney General Biddle,¹⁶ to the effect that a resident alien enemy was not prevented from suing.¹⁷

A very interesting case was decided by the United States Supreme Court,¹⁸ brought by a Japanese resident of California in the United States District Court, Southern District of California. The suit was abated by that court. After a denial of an application to the Circuit Court of Appeals for the 9th Circuit to compel the District Court to try the case, the plaintiff filed an application for leave to apply for a similar writ of mandamus in the Supreme Court of the United States, which leave was granted. The Supreme Court requested the Solicitor General to state his views. Accordingly, he filed a brief as *amicus curiae* supporting the contention that jurisdiction should have been taken and that it was not proper to abate the action. In his brief the Solicitor General argued that Section 7 (b) of the Trading with the Enemy Act contains no affirmative prohibition against suits by enemies and that in that section of the Act Congress sought merely to make certain that it was understood that the common law remained in effect. Furthermore, in that brief the Solicitor General advocated a new concept to the effect that an enemy alien, whether or not he is a resident, shall be permitted to sue on condition that the sum recovered be paid over to the Alien Property Custodian. This view of the Solicitor General was adopted by the Circuit Court of Appeals, 3rd Circuit, August 3, 1942, in *In re Bernheimer*,¹⁹ where the court upheld the right of an enemy subject to prosecute a lawsuit in this country, even though said enemy subject is resident in enemy or neutral territory, and to proceed to judgment, providing, however, that adequate measures are taken to prevent advantage to the enemy.

The United States Supreme Court likewise in the aforesaid case upheld the views of the Solicitor General and issued a writ of mandamus to compel

¹⁵ 314 U. S. 510; 62 S. Ct. 373; this JOURNAL, Vol. 36 (1942), p. 489.

¹⁶ N.Y.L.J., Feb. 5, 1942.

¹⁷ The most comprehensive article on the subject of suits by alien enemies is that of Sterck and Schuck, 30 Georgetown Law Journal (March 1942), p. 421.

¹⁸ *In re Kawato*, 63 S. Ct. 115.

¹⁹ 130 F. (2d) 396.

the District Court to vacate its judgment and proceed to trial of the action, Justice Black, in a unanimous opinion, writing as follows (pp. 118, 119):

In asking that the rights of resident aliens be abrogated in their behalf, private litigants in effect seek to stand in the position of government. But only the government, and not the private individual, is vested with the power to protect all the people, including loyal aliens, from possible injury by disloyal aliens. If the public welfare demands that this alien shall not receive compensation for his work or payment for his injuries received in the course of his employment, the government can make the decision without allowing a windfall to these claimants. Even if petitioner were a nonresident enemy alien, it might be more appropriate to release the amount of his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323, 40 S. Ct. 160, 161, 64 L. Ed. 286, in which this court said that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

* * * * *

Not only has the President not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts, and this stand is emphasized by the government's appearance in behalf of petitioner in this case.

This concept, that a non-resident alien enemy should be permitted to prosecute a suit in our courts, received recent approval in an action pending in the Supreme Court, New York County.²⁰ In that action suit was brought on a judgment of the High Court of Justice of England rendered on February 12, 1942, which confirmed an award of arbitration. The plaintiff was a French corporation with its principal place of business in Paris, therefore an alien enemy. The court held as follows:

(1) that the plaintiff is an enemy alien within the definition of the Trading with the Enemy Act, (2) that the motion to dismiss the action should be denied, (3) that the action may proceed to judgment, but that (4) the proceeds of the judgment, if and when obtained, be delivered to the Alien Property Custodian for such disposition as may later be determined.

New concepts as to the definition of "alien enemy" have arisen in connection with the freezing control. As above stated, the freezing orders are based upon the provisions of Section 5 (b) of the Trading with the Enemy

²⁰ *H. P. Drewry, S.A.R.L. v. Onassis*, N.Y.L.J., Nov. 17, 1942, p. 1496.

Act as amended by the Act of September 24, 1918,²¹ by the Act of May 7, 1940,²² and the First War Powers Act of December 18, 1941.²³ As is well known, freezing control was first instituted when the Germans invaded Norway and Denmark in 1940. On that day the President, by Executive Order No. 8389 of April 10, 1940, prohibited transactions involving Norwegian and Danish property except as authorized by the Secretary of the Treasury. Thereafter, as other countries were invaded or subjected to the domination of Germany, Italy or Japan, freezing control was made applicable to them. On June 14, 1941, a most important extension of freezing control took place. The remaining countries of continental Europe, including Germany and Italy, were brought under the control. Russia was thereafter excepted. This step changed the emphasis of freezing control from defensive weapon primarily intended to protect the property of nationals of invaded countries, to a frankly aggressive weapon against the Axis and its nationals. On July 26, 1941, when Japan overran Indo-China, the control was invoked against Japan.

With the issuance of these freezing orders a new definition for the word "national" was adopted. While the Nationality Act of 1940 defines a "national" as a person of permanent allegiance to a state,²⁴ under the June 14 order a new meaning has been given to the term "national" of a blocked country. A blocked national is any person²⁵ who falls under any of the following categories:

- (i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this order;
- (ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined;
- (iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country; and
- (iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this order and/or nationals thereof are sufficient in the aggregate to con-

²¹ 40 Stat. 966.

²² 54 Stat. 179.

²³ 50 U.S.C. Appendix, Sec. 616.

²⁴ 8 U.S.C. 501.

²⁵ See Executive Order No. 8785, as amended, which amends Executive Order No. 8389.

stitute, within the meaning of the foregoing, control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. *The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national.* Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this order or national thereof, as herein defined. [Italics mine.]

This definition introduces as the test of nationality not only domicile in the blocked country but also residence. Thus, citizens or subjects of, for example, Brazil, are thus blocked if they were domiciled or resided in a blocked country at the time of or at any time since the freezing date of such country.

The above executive order creates an entirely new concept of nationality, including the following one: partnerships, associations, corporations or other organizations, a substantial part of whose obligations have been owned or controlled directly or indirectly by nationals of a foreign country. It seems somewhat doubtful, despite a Treasury ruling, that an American partnership or corporation becomes a foreign national merely by reason of the fact that substantial obligations are owing by it to foreign nationals.

In the same executive order the President directs:

The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. [Italics mine.]

It also seems doubtful that the Secretary of the Treasury can be properly endowed with such power.

On March 18, 1942, the Treasury Department introduced a new concept of the term "enemy national" by the issuance of General Ruling No. 11,²⁶ defining "enemy national" so as to include not only the government of any country against which the United States has declared war, but also any agent, instrumentality or representative of those governments or other persons acting for them, wherever situated, including the accredited representatives of other governments to the extent that they actually represent the interests of those governments with which the United States is at war. This general ruling likewise includes in its definition of "enemy national" the government of any other blocked country having its seat within enemy ter-

²⁶ 7 Fed. Reg. 2168.

ritory, and any agent, instrumentality, representative or other person acting for it and actually situated within enemy territory, *as well as any individual or organization to the extent that it is actually situated within enemy territory.* Obviously, the last sweeping definition includes persons who are in enemy territory by mere presence therein, notwithstanding that they may reside elsewhere.

Finally, on July 6, 1942, Executive Order No. 9095 establishing the office of Alien Property Custodian and defining its function, was amended. In this executive order, as amended, the term "national" receives a new meaning, in that persons not within designated enemy countries, even though they may be within enemy occupied countries or areas, are not deemed by said executive order to be nationals of a designated enemy country, unless the Alien Property Custodian determines "(i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country."

As stated in the press release issued by The White House at the time Executive Order No. 9095 was issued, such order distributes the powers of the Treasury Department and the Alien Property Custodian in the following manner:

1. The Alien Property Custodian will handle:

- (a) Enemy-owned or controlled businesses (including dummies) operating in the United States and the dollar balances and other assets of such businesses.
- (b) Businesses owned or controlled by nationals of neutral or occupied countries and which are now under Treasury regulation where the Alien Property Custodian certifies that it is necessary in the national interest for him to assume control in order (i) to protect the property; (ii) to remove personnel or supervise employment policies; (iii) to liquidate, reorganize or sell the business; (iv) to manage the business; or (v) to vest the business.
- (c) All other enemy property except dollar balances, bullion and securities unless the dollars, bullion or securities of an enemy are needed by the Alien Property Custodian in the management of other property taken from the same enemy.
- (d) All *foreign*-owned patents, copyrights, and trade-marks.
- (e) Foreign ships (particularly that group of enemy-owned ships which the United States has libeled and are now involved in judicial forfeiture proceedings).
- (f) All forms of property and claims of enemy nationals involved in estates, trusts, receivership proceedings, etc. The Alien Property Custodian would also handle the representation of the interest of enemy nationals and persons in occupied countries in judicial and administrative proceedings in the United States and

the Alien Property Custodian will issue regulations governing the service of process on such persons.

2. The Treasury will continue to handle:

- (a) The dollar balances, bullion and securities of governments or nationals except those which belong to an enemy business.
- (b) All property of the occupied and neutral countries and their nationals except those particular business enterprises where the Alien Property Custodian determines that it is necessary in the national interest for him to assume control.
- (c) All transactions or business dealings with countries frozen under the freezing orders including the control of all trade and commercial communications with the enemy and enemy-controlled countries.
- (d) All other phases of freezing control which it has handled in the past or which may hereafter arise.

Under the provisions of this Executive Order No. 9095, as amended, the Custodian is authorized to seize foreign-owned patents, copyrights and trademarks and foreign ships, irrespective of their nationality, whether enemy or not. Under the First War Powers Act the President is authorized to vest in himself or his agent the property of friendly aliens or friendly governments. Nothing is said about compensation. Under the case of *Russian Volunteer Fleet v. United States*,²⁷ a grave question arises whether the President can be properly authorized by statute, and therefore whether he can properly delegate to his agent the power, to take property without a provision for compensation. In the recent article of Mr. Edgar Turlington entitled "Vesting Orders under The First War Powers Act,"²⁸ the author interprets the vesting of property under existing legislation to have been authorized in contemplation of subsequent provision for compensation to non-enemy owners and either compensation or credit (against claims) to enemy nationals and governments.

Reverting to the subject of freezing control, many interesting questions have arisen in connection with debts owing by the owners of frozen funds. In the recent case of *Commission for Polish Relief v. Banque Nationale*, decided by the Court of Appeals of the State of New York on July 29, 1942,²⁹ frozen funds are held to be subject to attachment. It is claimed by the Treasury Department that, even though an attachment is obtained in the action in which a warrant of attachment is levied on frozen funds, whether the debt shall be paid out of the frozen funds is a matter of discretion vested in the Treasury Department. In view of the fact that during the last war, debts, when owing to a non-enemy, for example, to an American citizen, by enemy owners, were collectible out of the property seized by the Custodian, the recent determination of the Treasury Department that these debts shall not be paid, creates a new concept in international law. It is claimed by the

²⁷ 282 U. S. 481; this JOURNAL, Vol. 26 (1932), p. 159.

²⁸ This JOURNAL, Vol. 36 (1942), p. 462.

²⁹ 288 N. Y. 332.

Treasury Department that the payment of such debts should await the termination of the war and the marshalling of claims, private and public. However, in view of the fact that, if the frozen funds are taken over by the Custodian, a claim for an indebtedness owing to a non-enemy may be filed under Section 9 of the Trading with the Enemy Act or under the provisions of the vesting order, it would seem that the ruling of the Treasury Department is of doubtful validity.

The Treasury Department has taken the position that it may withhold a license from a creditor even though the creditor has obtained an attachment followed by a judgment. It seems very questionable whether Congress ever intended that a judgment of a court of competent jurisdiction should be, in effect, nullified by a ruling of the Treasury Department after the incurrence of the indebtedness upon which the judgment was obtained.

Under the Trading with the Enemy Act as enforced during the last war, a seizure of property was made by serving a demand upon the person holding property owned by an enemy. The present procedure is to issue a vesting order and serve the same upon the person in possession of the property. A specimen copy of such vesting order reads as follows:

VESTING ORDERS

INTERESTS OF PARTNERS IN _____ . . .

Vesting Order No. — Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding that the property described as follows:

All right, title and interest as copartners in and to _____ a partnership, of each of the persons whose names and last known addresses are, respectively, as follows:

Name:

Last known addresses

_____ is property of nationals, and represents an interest in a business enterprise within the United States which is a national, of a designated enemy country (Japan), and determining that to the extent that any or all such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of a designated enemy country, and having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act, or otherwise, and deeming it necessary in the national interest, hereby vests such property, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The terms "national," "designated enemy country" and "business enterprise within the United States" as used herein shall have the meanings prescribed in Section 10 of said Executive Order. (E. O. 9095, 9193, 7 F. R. 1971, 5205.)

Executed at Washington, D. C., on July , 1942.

LEO T. CROWLEY,
Alien Property Custodian

It will be noted that this order provides for the filing of notice of claim with the Alien Property Custodian within one year from the date of the vesting order. Under regulations issued by virtue of authority vested in the Alien Property Custodian by the President pursuant to Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301 of The First War Powers Act, a committee is to be established to be known as the Vesting Property Claims Committee, to be composed of three men designated by the Alien Property Custodian. This committee shall hear the claims thus filed, and make a report to the Alien Property Custodian, after which the Alien Property Custodian will issue a decision. There is no provision made as to the payment of such claims, and up to this present writing we are informed there have been no claims heard or decision rendered by the Custodian. This is a new concept by virtue of which the Custodian becomes judge and defendant in his own case.

Under the Trading with the Enemy Act as in force during the last war, it was held in *Stoehr v. Wallace*,³⁰ that the provision contained in Section 9 allowing the maintenance of an action by a person who is not an enemy, for the return of property wrongfully seized, prevented the law from being unconstitutional. Consequently, if there is no proper provision in the Trading with the Enemy Act as presently amended, allowing a court review of a wrongful seizure of property, there is a possibility that the amendment may be held unconstitutional.

Due to the fact that Section 9 (a) of the Trading with the Enemy Act provides for the filing with the Custodian of claims against an enemy owner, and that Section 9 (e) of said Act provides that a claim must have arisen before October 6, 1917, considerable confusion has arisen as to whether Section 9 (a) still applies. Certainly, legislation should be enacted to clarify the subject.

In Great Britain, when an enemy business is taken over, the assets can be collected and distributed among the unsecured non-enemy creditors of such business.³¹

Another interesting question arises as to whether the property seized during the present war will be permanently confiscated and what should be the policy with regard thereto. In a release to the press,³² the President, when directing the summary seizure of enemy patents, stated that they would be kept. On the other hand, the Secretary of the Treasury in his press re-

³⁰ 255 U. S. 239, 41 S. Ct. 293.

³¹ See *The Defence (Finance) Regulations*, by F. C. Howard, Butterworth & Co., Ltd., London, June 1, 1942.

³² New York Times, April 22, 1942.

lease,³³ when it seemed probable that he would be the Custodian, stated that he would not sell any of the seized property as was done in the last war, adding, "If there is no honey, there will be no flies." Prior to the last war the United States Government, speaking through the Secretary of State as authorized by President Wilson, stated that there would be no confiscation of property. The reports of Congress in connection with the Settlement of War Claims Act likewise indicated that confiscation had never been and was not the policy of the United States.

In view of the fact that our nationals have more property abroad than foreign nationals have here, intelligent self-interest dictates that we should not enter upon a policy of confiscation. However, the Final Act of the Inter-American Conference on Systems of Economic and Financial Control,³⁴ held as aforesaid at Washington from June 30 to July 10, 1942, would indicate that a policy of confiscation may have been intended by that conference, for the following recommendation was adopted as part of its Final Act:

1. That, in accordance with the constitutional procedure of each country, all necessary measures be adopted as soon as possible, in order to eliminate from the commercial, agricultural, industrial and financial life of the American Republics, all influence of governments, nations, and persons within such nations who, through natural or juridical persons or by any other means are, in the opinion of the respective Government, acting against the political and economic independence or security of such Republics, and that to this end the following measures be adopted:
 - (a) The business, properties and rights of any real or juridical person included within the terms of the foregoing paragraph, whatever their nationality, shall be the object of forced transfer or total liquidation; and, if this should not be desirable in the opinion of the Government of each country, they shall be the object of blocking, occupation or intervention in order to give effect to the purposes of this recommendation.

It has been suggested that the recommendation of the Inter-American Conference was designed to bring about the elimination from business life of persons and firms whom the United States had placed upon the American Black List, so that here, too, we find an entirely new criterion and classification for "alien enemies."

It appears from a press dispatch that, pursuant to these recommendations made at the aforesaid conference, the Mexican Government has made arrangements for the sale of seized property of Axis nationals pursuant to a presidential decree. This enlarges on the original Mexican governmental order of June 13, 1942, declaring all properties of Germans, Italians and Japanese subject to confiscation. The new decree specifically provides:

³³ New York Times, March 12, 1942.

³⁴ Congress and Conference Series No. 39, p. 19, Supplement to this JOURNAL, p. 9.

The government will henceforward have the right to discharge officials, employes, representatives or agents of the companies confiscated, when and if there exists internal or economic or administrative reasons for doing so, and that these properties confiscated by the Mexican Government may be placed on sale in accordance with the law.

It is further stated that the properties of the firms to be placed on sale must first be listed by the Mexican authorities and checked with information provided by Washington.³⁵

Under Executive Orders Nos. 9066 and 9102³⁶ the Western Defense Command has issued a number of orders excluding persons of Japanese ancestry from specified military areas. These are called "evacuees." By virtue of the aforesaid Executive Order No. 9102 (March 18, 1942) the War Relocation Authority has established the Office of Emergency Management to formulate and effectuate a program for these evacuees. The constitutionality of these proclamations and orders was passed upon by the United States District Court, Western District of Washington,³⁷ on April 15, 1942, the court holding that these proclamations were constitutional, including the proclamation of the Commanding Officer, Lieutenant General John L. DeWitt. Violations were subject to the criminal penalties provided by Public Law No. 503 (77th Congress), approved March 21, 1942.

Another new concept has arisen in connection with the eight saboteurs who recently were tried before a military tribunal and whose application for habeas corpus was dismissed by the United States Supreme Court. On July 2, 1942, the President issued a proclamation, No. 2651,³⁸ proclaiming that

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly.

The validity of this presidential proclamation was sustained by the United States Supreme Court on July 31, 1942, the full opinion being thereafter announced on October 29, 1942.³⁹ The court held that the petitioners had violated the law of war, which the court specifically held included offenses against the law of nations, Justice Stone writing as follows (p. 11): "It is

³⁵ New York Times, Aug. 18, 1942.

³⁶ C.C.H. War Law Service 8066.

³⁷ *Ex parte Ventura, et al.*, 44 F. Supp. 520; also *Ex parte Lincoln Seiichi Kanai*, 46 Fed. Supp. 286; *U. S. v. Gordon Kiyoshi Hirabayashi*, 46 Fed. Supp. 657: See contra opinion of Judge Fee, N. Y. Times, Nov. 17, 1942, U.S.D.C., District of Oregon, 11 U. S. Law Week, 2413.

³⁸ C.C.H. War Law Service 8039.

³⁹ 11 U. S. Law Week, 4001; 63 Sup. Ct. Rep., pp. 1, 3; this JOURNAL, *infra*, p. 152.

no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." Thus, the United States Supreme Court has sanctioned a new concept—the deprivation of resort to a civil tribunal—because of a violation of a rule of international law.

Another new concept created under Section 5 (b) of the Trading with the Enemy Act, as amended, as above set forth, is that of withholding credit from any person who does not comply with the directions of the Executive. According to the press, it appears that the Treasury Department has proposed a method of handling the wage problem. It reports that the Treasury plan would set up a wage division in the War Labor Board under the authority issuing from the Treasury's control over credit as embodied in the Trading with the Enemy Act. Under the Act a business concern would not be allowed to use credit transactions unless it followed the wage policies set forth by the Wage Division.⁴⁰

In the case of *Anderson v. N. V. Transandine Handelmaatschappij*,⁴¹ decided by the Court of Appeals of the State of New York, July 29, 1942, the following question was certified to that court:

Did the Netherlands Royal Decree of May 24, 1940, operate to bar the levy of an attachment by the plaintiff subsequent to the enactment of said decree on property in this state belonging to the defendants when said decree was enacted, and the title to which was declared by said decree to be thereby vested in the State of the Netherlands?

The question certified was answered in the affirmative. The Court of Appeals affirmed the order of the Appellate Division affirming the decision of the Special Term, opinion by Justice Shientag.⁴² Judge Lehman in that case said:

There can be no doubt that the decree of May 24, 1940, promulgated by the recognized Government of the State of the Netherlands is part of the law of a friendly sovereign State of which the defendants are subjects and in which the defendants are domiciled, and that under such law title to the property described in the decree belonging to the nationals and residents of the State of the Netherlands (including the property upon which the sheriff has attempted to levy) is vested in the State of the Netherlands. By comity of nations, rights based upon the law of a foreign State to intangible property, which has a situs in this State, are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State. That rule is part of the law of this State, as it is, in general, the law of all countries which accept the reign of law. The question which the courts below were called upon to decide is whether the sequestration by the government of the State of the Netherlands of property here belonging to its own nationals offends our public policy.

⁴⁰ New York Times, July 28, 1942.

⁴¹ 289 N. Y. 9; this JOURNAL, Vol. 36 (1942), p. 701.

⁴² 28 N.Y.S. (2d) 547.

The views of Justice Shientag in the Anderson case (*supra*) were followed recently by the English Court in the decision of *Lorentzen v. Lyddon & Co., Ltd.*⁴³ In that case Lord Atkinson in the King's Bench followed Judge Shientag in the Anderson case in giving effect in England to a decree of the Norwegian Government sitting at Trondheim May 18, 1940, requisitioning all Norwegian ships wherever they might be. This decree was given effect in England as a legitimate requisition. The court stated that "public policy certainly demands that effect should be given to this decree," a conclusion which is explainable by the fact that this same Norwegian Government immediately contracted with the British Government to turn over to England the entire Norwegian fleet thus requisitioned.

The decisions in the Anderson case, *supra*, and in the English case, may be regarded as a digression from the former concept as to confiscatory decrees of a foreign government in relation to property within the territory of another state as not to be effective to transfer property in that other state.⁴⁴

An interesting decision in connection with the aforesaid Dutch decree was recently handed down in the Surrogate's Court, New York County, in the matter of *Estate of Emanuel Kahn*.⁴⁵ In that case a discovery proceeding was brought against the Guaranty Trust Company of New York for the purpose of directing it to deliver certain securities and moneys on deposit in the sum of \$45,580.25, upon the ground that such properties were owned by the decedent and deliverable and payable to the petitioner as the legal representative of his estate. The petitioner was the Public Administrator of the County of New York. The decedent was a national of the State of the Netherlands, and died at The Hague on June 30, 1941. The trust company, in its answer, alleged that the securities in question here, along with others held under an agreement with a Dutch bank, had been placed by the trust company to the credit of the bank in a custodian account. The State of the Netherlands, through its ambassador, was permitted to intervene upon the condition that under the decree of May 24, 1940, title to claims belonging to its nationals were vested in the State of the Netherlands. Pursuant to the suggestion of the court, counsel for the Netherlands procured the consent of that government to withdraw its claim to the title to the funds under the royal decree, reserving its right to claim title to any money distributable to its nationals as next of kin, or otherwise. The decedent died intestate and was survived by two daughters as his only distributees, one of them residing in New Jersey and the other a non-resident of the United States. The resident daughter had made application for citizenship to the United States and in 1941 received her first papers. The court pointed out, under the terms of the Dutch decree the rights vested in the State of the Netherlands "shall

⁴³ 71 Lloyd's L. R. 197 (1942).

⁴⁴ F. C. Howard, in *Defence (Finance) Regulations*, *supra*, p. 18; *Bollack v. Société Générale Pour Favoriser, etc.*, 33 N. Y. S. (2d) 986.

⁴⁵ N.Y.L.J. Nov. 23, 1942, p. 1578.

only be exercised for the conservation of the rights of the former owners" and restitution is to be made to "the former owners" after the period of the emergency shall have passed. The court made the following direction: That the trust company shall turn over to the Public Administrator the securities set forth in the petition, after obtaining the necessary license required by executive order, and that the Public Administrator shall promptly initiate a final accounting and cause a citation to be served upon the Dutch bank and the other necessary parties to the proceeding, including the trust company and the State of the Netherlands, in which accounting proceeding the claim of the State of the Netherlands will be determined; and likewise any rights of the Alien Property Custodian to the payment of the moneys found due to the foreign distributee.

From what has been said, the conclusion is inevitable that the present World War has created many innovations in legal and regulatory concepts as to the alien and his property.

ALIEN SEAMEN'S RIGHTS AND THE WAR

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At the moment, alien seamen¹ present problems due to a variety of factors: The inability of Norwegian, Greek, Yugoslav, Dutch, Belgian, and other friendly vessels to return to their home ports under German occupation to replenish their crews with nationals; the dislocation throughout Europe of arrangements for hiring, paying, and attending to the welfare of seamen; the inability of American immigration authorities to force the repatriation of Norwegian, Greek, etc., seamen who overstay their leave in our ports; the wage and other labor difficulties arising from the freedom of seamen to accept or reject any offered job, to quit their jobs and seek better ones; and the operation of our Asiatic exclusion laws upon increasing numbers of Chinese and Lascar seamen.

In the absence of a treaty, the United States authorities cannot act upon a request for the apprehension and return of deserters.² The common law, however, was early changed by statute.³ The texts which became R. S. 4081 and 5280 were enacted on March 2, 1829, and amended on February 24, 1855, and these, together with treaties with the most important ship-owning nations, set the pattern until 1915.

In the nineteenth century, all seamen signed on ocean-going vessels on articles were substantially indentured servants, bound to their jobs and to their ships for the time and at the pay stated in the articles of indenture. The public recording of the articles in customs houses, and the statutory prescription of permissible clauses, offered a certain protection to the men who were paternally spoken of by the judges as "wards of the Admiralty." If they deserted their ships, the American police could be besought to arrest them and return them to the custody of the consul and master of the vessel. If they struck, they were subject to the ship's internal discipline and could, with the support of the consul, be held in the brig, carried home and subjected to punishment by the home authorities. This system was embodied

¹ The expression "alien seamen" is ambiguous; it usually means an individual who is an alien and a seaman on any vessel, including those of the American flag; or it may mean a seaman signed on a vessel of an alien flag, even though an American citizen.

² Hyde, *International Law* (1922), Vol. 1, Sec. 484, citing *Tucker v. Alexandroff*, 183 U. S. 424, 427, 430 (1902), a five-to-four decision. See also Hackworth, *International Law Digest* (1941), Vol. 2, p. 248.

³ The Act of July 20, 1790, c. 29, for apprehension and forcible return of deserters from American vessels, was upheld as constitutional in *Robertson v. Baldwin*, 165 U. S. 275 (1897), a seven-to-one decision (Harlan, J. dissenting), and was promptly repealed (30 Stat. 764 [1898]). The treaties as to desertions from foreign ships, however, survived until 1916-1919.

in some 44 treaties, of which that with Great Britain, signed as late as 1892,⁴ was the most important. Article 1 provided that

Consuls General . . . shall have power to require from the proper authorities the assistance provided by law for the apprehension, recovery and restoration of seamen who may desert from any ship belonging to a citizen or subject of their respective countries while in the ports of the other country. . . . The preceding stipulation shall not apply to citizens or subjects of the country where the desertion shall take place.

Thus an American citizen could freely desert a British ship in a United States port, and a British subject could freely desert an American ship in a British port. But no other seaman, regardless of nationality, could desert any ship in either country. This treaty illustrated the prevailing system. American shipping being at a very low ebb in those days, the rule as to deserters operated powerfully in favor of foreign flag ships, and as the American wage level kept rising, the American merchant marine was more and more hampered by the increasing handicap of the low wages paid by foreign ships.

The Seamen's Act of 1915,⁵ sponsored by the senior Senator LaFollette and popularly known as the LaFollette Act, embraced a large number of reforms, one of which was the declaration of policy, in Section 16, and the corresponding direction to the President to sweep aside all treaty arrangements for arrest of deserting seamen and the repeal of R. S. 4081 and 5280. The penalties for desertion were expressly abolished, and it was provided that a deserter should merely sacrifice clothing, effects and balance of wages left behind.⁶ Other reforms in the LaFollette Act, many of them more complete and effective than Section 16, required the division of the crew into watches, prompt payment of wages, payment of half the wages already earned at each port, the abolition of flogging, the abolition of advance payments and the regulation of allotments, the abolition of the attachment of wages, the requirement that 75 per cent of the crew should be able to understand the officers' orders and that 65 per cent should be A. B. seamen, the complete revision of the schedules as to lifesaving appliances, the reporting

⁴ U. S. Treaty Series, No. 141; U. S. Stat., Vol. 27, p. 961. The last in date was with Spain, U. S. Treaty Series, No. 422, July 3, 1902, Art. 24.

⁵ 38 Stat. L. 1184 (March 4, 1915).

⁶ The Congressional direction to denounce all contrary treaty provisions was complied with (U. S. Foreign Relations, 1915, p. 3; 1916, pp. 33-41; 1917, pp. 9-18; 1918, pp. 3-10; 1919, pp. 47-73). "Desertion" clauses were duly denounced in treaties with Belgium, Brazil, China, Colombia, Denmark, France, Great Britain, Greece, Italy, Netherlands, Norway, Rumania, Spain and Sweden. The usual effective date was July 1, 1916; but The Netherlands, Norway, Spain and Sweden did not agree until 1919. Austria-Hungary and Germany never agreed; but their treaties ended with the war. All of these countries, except Colombia and Great Britain, felt it suitable simultaneously to denounce clauses giving consuls jurisdiction of disputes over internal discipline of ships. "Desertion" clauses in other treaties had ceased to be effective for a variety of reasons.

of barge towing accidents, the authority to send any seaman incapacitated abroad to a consul, and the modification of the fellow servant rule as to seamen having command over their fellows. The Act thus struck a great many blows of varying strength at many roots of a large number of evils, and the encouraging of desertion was only one, and perhaps the least adequately developed of all these reforms. For Congress made no corresponding gesture towards modifying as to seamen any of the immigration or exclusion laws. The right to desert, breaking the contract of employment between the seaman and the ship, was not accompanied by any general right to come ashore as between seamen and the local police power. A seaman desiring to desert could collect half-pay to date, under Sections 3 and 4, pick up such clothing and effects as he could carry on his back, and proceed to walk off his ship, knowingly sacrificing the other half of his wages and such clothes and effects as he could not carry with him, under Section 7, but fearing no other penalty from the master of his ship and the consul of his flag. However, he still faces the problem whether the American immigration officers will let him land and that depends entirely upon his immigration status. If he is a member of a race excluded under the Asiatic exclusion laws, the American police will compel his detention on board, despite his right to desert his ship. Thus in practical effect the economic advantages of the freedom to desert offered by Sections 16 and 17 of the Seamen's Act of 1915 have only been freely available to seamen who chance to possess such immigration status as is necessary for coming ashore.

Although the Seamen's Act took effect in the middle of World War I, the deserter treaties were not effectively denounced until the submarine war was near its crisis.⁷ Merchant seamen were showing the same reluctance about going to sea in unarmed or lightly armed ships to face the submarine peril that many show today, but the Pacific was then free except for a few raiders, and the Caribbean and South Atlantic were also peaceful. Adequate numbers of seamen remained at work in the North Atlantic from patriotic motives under stimulus of higher pay, and because the submarine peril began to decline in dramatic fashion. Many alien seamen were temporarily employed in the rapidly expanding American merchant marine.

In the atmosphere of victory and generosity engendered by the winning of the war, foreign seamen (unless excluded because of Asiatic race) were freely allowed to quit their foreign ships and come ashore. A rather loose rule allowed them sixty days in which to re-ship foreign.⁸ A substantial number, using this method to get around the rather simple immigration

⁷ The State Department circular to United States consuls directing them to desist from further efforts to apprehend deserters from American ships was dated Aug. 15, 1917. Hackworth, *supra*, p. 253.

⁸ The Department of Labor, in 1917, felt "compelled to enforce the immigration law, so far as it applies to the cases of seamen, in such manner as not to interfere with the provisions of" the LaFollette Act, and declined to use the immigration laws to halt deserters from Portuguese ships. Hackworth, *supra*, p. 253.

formalities then in effect, simply remained in the country and did not re-ship at all. In general, the Seamen's Act has operated to raise wages of foreign ships trading to American ports to something resembling parity with American wages. Working conditions also responded to a considerable extent. Shipboard living conditions have not responded as readily; crew quarters built in a ship cannot easily be enlarged. It is disheartening to learn that in carrying out the present tremendously expanded shipbuilding program the crew quarters being built into certain standard ships for foreign account are inferior in space and lay-out to those being provided in identical types for American account. The long-range effort to equalize the working conditions of seamen regardless of flag has thus been checked for another twenty years, or until the new vessels with inferior accommodations wear out.

The rigorous Asiatic exclusion laws impose a mandatory fine of \$1,000 for the escape of each excluded Asiatic.⁹ Consequently shipowners employing Asiatics use drastic methods to keep these men confined on shipboard in American harbors. After the Pacific Mail abandoned its service in 1915 there were few Asiatic seamen on American flag vessels, but many were employed on British ships, especially those trading with India. However, the American President Line, operating our new passenger ships around the world on a fortnightly schedule after World War I, was soon employing large numbers of Chinese stewards and stewardesses, and there were incidents connected with their detention on board. During the great California strike in 1935, three of these liners were moored for many weeks in the Hudson River with several hundred Asiatics on board, and only the sudden ending of the strike prevented a mass of *habeas corpus* proceedings¹⁰ to obtain for these people their liberty and compel their prompt repatriation to China.

In the spring of 1942, the press reported incidents at New York, Philadelphia, and other ports, indicating marked restlessness among Chinese seamen on British and other ships and forbidden to have shore leave; several crimes of violence were committed in efforts to rush the gangways and to restrain the men.^{10a} The Joint Maritime Commission of the International Labor Office, meeting at London (12th Session) on June 26-30, 1942, adopted a resolution recording "admiration of the war effort of Chinese, Indian, and all other seamen from Asia, Africa, the East and West Indies," and urged that "all practicable steps should be taken to ensure that in the conditions of employment and general treatment of these seamen there should

⁹ 8 U. S. Code, 269 and 274. If the violation is "knowing," the vessel is forfeitable (8 U. S. Code, 268), and the master may be fined \$500-\$1,000 and imprisoned 1-5 years (8 U. S. Code, 279).

¹⁰ 8 U. S. Code, 286.

^{10a} See *People v. Rowe*, N. Y. Misc.——; 1942 Amer. Mar. Cases 1229, a grand jury proceeding arising out of the killing of a Chinese seaman during a meeting on the British *M.S. Silver Ash* in Brooklyn.

be no unfavorable comparison with crews of vessels in similar trades and under the same registry." ¹¹ Immediately thereafter a British-Chinese agreement was announced in London conceding substantially increased pay to Chinese seamen; and on July 28 an agreement was made in Washington with the Chinese Ambassador granting Chinese seamen shore leave privileges without the requirement of a bond. ^{11a} The occasion of the first Chinese shore leaves at New York received a good deal of press notice.

The International Labor Office of the League of Nations in Geneva elaborated a comprehensive series of general conventions relating to conditions of labor at sea, but the United States did not participate in this work until 1933, and United States delegates had a hand in shaping only the conventions of 1936. In general, the Maritime Conventions of the International Labor Office reflected the views of Great Britain and the countries of Central Europe. They do not declare any general right of seamen to desert their ships in a safe port. They endeavor to satisfy the demands of sea labor by standardizing working conditions on satisfactory levels without changing the ancient principle that a seaman is an indentured worker and bound by his indenture. ¹²

The American attitude expressed by the Seamen's Act was offset by several nations by various methods of holding their seamen on their ships. Thus French seamen were in general bound to a form of naval reserve service, such that it was a breach of military discipline to desert. After the Nazi party obtained control in Germany in 1933, German crews became bound by party discipline. Russian Soviet crews were likewise bound by party discipline so that desertions were few.

The American policy was first modified on February 5, 1917, with the provision of a \$5,000 penalty for signing on a seaman in bad faith to enable him to evade our immigration laws by deserting in the United States. ¹³

It was next modified in the enactment of the quota visa statutes restricting

¹¹ International Labour Review, Vol. 46, No. 2, Aug. 1942; also 1942 American Maritime Cases, 1178, 1185.

^{11a} Text of news release at 1942 Amer. Mar. Cases (part 10, Nov.)

¹² (1) Minimum Age (Child Labor at Sea), No. 7, 1920, revised as No. 58, 1936. (2) Unemployment after Shipwreck, No. 8, 1920. (3) Employment or Hiring of Seamen, No. 9, 1920. (4) Minimum Age of Trimmers and Stokers, No. 15, 1921. (5) Medical Examination of Young Seamen, No. 16, 1921. (6) Seamen's Articles of Agreement, No. 22, 1926. (7) Repatriation of Seamen, No. 23, 1926. (8) Longshoremen's Act and Compensation, No. 28, 1929, and No. 32, 1932. (9) Seamen's Welfare in Ports, No. 48, 1936. (10) Professional Capacity of Merchant Marine Masters and Officers, No. 53, 1936. (11) Seamen's Annual Holiday with Pay, No. 54, 1936. (12) Sickness, Injury or Death of Seamen, Liability of Shipowner, No. 55, 1936. (13) Sickness Insurance (Sea Labor), No. 56, 1936. (14) Hours of Work and Manning, No. 57, 1936.

The 12th Maritime Conference of the International Labor Office met in London in June, 1942, and considered measures for the better protection of seamen against perils of the submarine war; an American delegation attended and took an active part.

¹³ 39 Stat. L. 895; 8 U. S. Code, 165.

immigration in 1924. It was there provided that no alien seaman excluded from admission under the immigration laws shall be permitted to land, except temporarily for medical treatment or pursuant to regulations to be made by the Secretary of Labor. The penalty, however, was merely that the man, if caught within three years, should be examined as to his admissibility, and if found inadmissible, be deported.¹⁴

Thus the new immigration control afforded a general basis for limiting freedom of alien seamen to desert. When the depression became severe in the early '30s, the burden of unemployed aliens caused much comment, and many alien seamen who had overstayed their sixty days were deported to their homelands.¹⁵ Gradually the immigration authorities became more active in checking up on the immigration status of seamen seeking shore leave. Means were thus ready at hand to minimize desertions when World War II began.

Between the first and second World Wars it was generally true that merchant seamen were, on principles of reciprocity, allowed to land with reasonable freedom in most of the ports of the world. After the beginning of World War II restrictions commenced again, not merely in the belligerent countries, but also in neutral countries. Thus the Portuguese authorities on at least one occasion compelled the officers and crew of an American passenger liner to remain on board the vessel throughout a call at Lisbon, all shore leave being denied except to the master for official business.¹⁶

World War II has brought many alien merchant seamen under some form of naval or military control. The United States while neutral did not abandon the rule of policy laid down by the Seamen's Act, and seamen of foreign flag vessels, while more closely watched, remained as free as before to desert their vessels in American harbors. As the submarine campaign became more intense, it was found that large numbers of seamen were availing themselves of this situation. When the United States entered the war in December 1941 it was estimated that over 8,000 alien seamen were ashore in American ports.

In this situation the American Government as a belligerent has not exactly abandoned its policy of permitting alien seamen to leave their ships and seek a better berth, but seems to have receded from the Labor Department's attitude of 1917 that the immigration laws should not be used to stop desertions. Administrative steps are now taken to insure that the seaman who deserts is acting *bona fide* and that he really does re-ship foreign again within a reasonably short time. Passport control of American seamen has been greatly elaborated.¹⁷

The merchant seamen problem might be solved, at least in war times, by

¹⁴ 43 Stat. L. 164; 8 U. S. Code, 166.

¹⁵ These men could also be reached for evading the \$8 head tax (8 U. S. Code, 132).

¹⁶ New York Times, May 31, 1941.

¹⁷ Dept. of State Bulletin, March 14, 1942, p. 231; May 16, 1942, p. 437; June 27, 1942, p. 563.

bringing the entire personnel under Navy control. American seamen are determined that this shall not occur. The possible benefits which they would obtain by coming into the Navy would be continuity of employment so long as the war lasts, with permanent pension rights, especially for the sick and disabled. On the other hand, they could no longer pick and choose as between ships and voyages offering jobs; they would forego civilian pay and also war bonuses, which are now either 40 per cent or 100 per cent, depending upon the zone through which the vessel passes; they would probably lose their present union organizations; and would lose the right to jury verdicts when they suffered bodily injury due to negligence. The seamen evidently prefer their present high rates of pay, however brief the war prosperity of shipping may be, and prefer to keep their unions and their economic and their legal status, even though there will be no pensions and no government aid for the disabled through the years to come.¹⁸

The present solution therefore is that seamen continue their civilian status and are free to accept or reject any particular ship or voyage which is offered them. They cannot be forced onto ships, whether they have signed in the United States or abroad. The United States, in coöperation with others of the United Nations, has announced that American citizens may only be employed on American, Honduran or Panamanian flag vessels, except by special consent, and that British, Norwegian, Dutch, Belgian, Yugoslav and Greek seamen will not be employed on American, Honduran and Panamanian flag vessels without the particular consent of their consuls.¹⁹ At the same time, alien seamen who decline to go to sea may be subjected to certain pressure by the combined action of our immigration authorities and of their Consuls. The persuasion of good pay and fair working conditions appears to be the chief means of bringing these men back into sea service. The basic policy of the Seamen's Act—that American police power shall not be used to compel alien seamen to work on foreign flag vessels at low wages in competition with American shipping—seems therefore to continue to be a factor in the situation.

¹⁸ An instance of wartime pay was *Assimacoupoulos v. Kulukundis Shipping Co.*, 1942 A. M. C. 761 (SDNY), concerning the proper pay of the chief cook and assistant cook of a Greek ship under articles signed in England in March 1941. The Greek statutory basic rate was £9 per month, plus £3 for baking bread, plus 80% bonus. During the contract the Germans conquered Greece, whereupon a good behavior bonus was abandoned and a 200% bonus was substituted. The court found that the agreement was as follows: Wages £62, plus £8 for baking bread for the chief cook, and £52 for the assistant cook. This was not better than mechanics' pay in American war factories, although the risk of death and injury by torpedo, shell and bomb was much greater.

¹⁹ War Shipping Administration Order, April 9, 1942; 7 Fed. Reg. 2761; 1942 A. M. C. 863; Dept. of State Bull., April 11, 1942, p. 321.

EDITORIAL COMMENT

RETRIBUTION FOR WAR CRIMES

Of the many problems which will beset the peacemakers at the end of the war, that of meting out punishment for atrocious crimes committed by the enemy will be one of the most complex and difficult. It is not a novel problem. Similar situations have occurred during most of the bitter conflicts of the past; but the spread of recent wars into continental and global proportions, the change in the character of hostilities obliterating almost entirely the former distinction between combatants and noncombatants, and the evident purpose of the present enemy to reduce large masses of conquered populations to permanent subjection and to exterminate others, including his own, whom he cannot assimilate into his so-called racial and ideological new order, have together resulted in an orgy of inhuman brutalities on a scale unprecedented in previous wars, not only in flagrant violation of universally accepted laws of war but which have also, in President Roosevelt's words, "violated every tenet of the Christian faith."

To those who profess an acquaintance with the progress of international law, it seems that history has been turned back at least three centuries, for we appear to be witnessing today what Hugo Grotius saw in 1625 during the early stages of the Thirty Years' War when he wrote in the Prolegomena to his *De Jure Belli ac Pacis*:

Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes. (§ 28.)

To restrain the primitive passions which inflamed nations at war was the main purpose of Grotius' classic work, and to that end he invoked what he called the Common Law of Nations and undertook to formulate it in a systematic exposition. His views gradually gained recognition in the conduct of recurring hostilities. It is said that Gustavus Adolphus of Sweden carried a copy of Grotius' work on his campaigns and slept with it under his pillow. But it remained for a political refugee from Germany, Francis Lieber, who had fought under Blücher in the campaign which ended Napoleon's career at Waterloo, and who later, because of his liberalism, was forced to flee his native land and seek asylum first in England and then to make his home in the United States, to reduce the laws of war to a separate code in the *Instructions for the Government of the Armies of the United States in the Field*, issued by President Lincoln as General Orders No. 100 during the American Civil War.¹ Lieber's *Instructions* formed the basis of the compilation of the

¹ General George B. Davis, in this JOURNAL, Vol. 1 (1907), p. 13.

laws of war on land adopted at an international conference at Brussels in 1874, revised at the Hague Conferences of 1899 and 1907 and readopted in the form of the Hague Convention respecting the Laws and Customs of War on Land which now embodies both the customary and the conventional law of nations on the subject.

Article I of the Hague Convention requires the high contracting Powers to issue instructions to their armed forces which shall be in conformity with the regulations annexed to the convention. The convention stipulates further that "until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." It is believed that the codes or manuals of war of all the Powers engaged in the present war conform substantially to the Hague Regulations.²

At the end of World War I, a formal attempt was made in the several peace treaties to bring to trial and punishment enemy persons accused of having committed acts in violation of the laws and customs of war. In the Treaty of Versailles with Germany, the Allied and Associated Powers further publicly arraigned William II, former German Emperor, for "a supreme offence against international morality and the sanctity of treaties," and provided a special international tribunal for his trial (Article 227).³ But William II was not tried and lived undisturbed at his place of refuge in Holland until he died a natural death on June 4, 1941. The reasons for this failure to carry out the treaty are not hard to find. William II was not charged with a crime defined or punishable by any existing international or penal law. The charge against him was a political one and his extradition from Holland was consequently not legally demandable under the law of international extradition which excludes political offences from its operation. Had jurisdiction of the person of William II been obtained by the special international tribunal charged with his trial, it was bound by the treaty to be guided in its decision "by the highest motives of international policy" and to fix such punishment "which it considers should be imposed"—again invoking political and not legal standards by which to judge and punish the accused. The phrasing of this so-called "arraignment" and the promptness with which its prosecution was abandoned give ground for a presumption that its framers were but going through the form of making good Prime Minister Lloyd George's campaign promise to the British people in December, 1918, to

² For the text of the Hague Convention and Regulations, see this JOURNAL, Supplement, Vol. 2 (1908), p. 90 *et seq.* For summaries of the pertinent articles of the American, British, French and German manuals of war, see J. W. Garner, "Punishment of offenders against the laws and customs of war," this JOURNAL, Vol. 14 (1920), p. 70.

³ This JOURNAL, Supplement, Vol. 13 (1919), p. 250.

"hang the Kaiser for starting the war," and that they did not expect to bring to punishment a member of the royal family of Europe.⁴ No such consideration existed in the case of Napoleon Bonaparte, who was declared a menace to the general peace of Europe and the delivery of his person made the first and most imperative term of the armistice between France and the Allied generals. By the Convention of Paris of August 2, 1815, he was, without trial, declared the prisoner of the Allies, placed under the guardianship of Great Britain, and spent the remainder of his life a prisoner at St. Helena under the surveillance of commissioners of his Allied captors.⁵

Articles 228-230 of the Treaty of Versailles recognize "the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war," and Germany undertook to hand over to the Allies such persons as were specified by them. These articles were for all practical purposes equally as abortive in their execution as was Article 227 relating to the former Kaiser. A few of the hundreds of accused members of the German armed forces were belatedly tried before the German Supreme Court at Leipzig and given police court sentences which were not seriously executed.⁶ Political expediency was no doubt responsible in some measure for the failure to execute these articles.⁷ Moreover, the Allies themselves made it difficult to carry them out in accordance with the treaty when they previously agreed in the armistice

⁴ See the series of letters pro and con the trial of the Kaiser published in the London Times of July, 1919, following Prime Minister Lloyd George's statement to the House of Commons July 3, 1919, that the Allied Powers had unanimously decided to try the Kaiser in London. (The London Times, July 4, 1919, p. 15.) Previously, suggestions that the trial of the Kaiser should take place at Washington or Paris had been made but discarded. (New York Times, July 9, 1919, p. 1.) For the diplomatic correspondence of the United States regarding the asylum of the Kaiser in Holland and his proposed extradition, see Foreign Relations of the United States, 1919, Vol. II, pp. 652-658, and *ibid.*, Paris Peace Conference, 1919, Vol. II, pp. 76-87.

⁵ Debidour, *Histoire Diplomatique de L'Europe*, I, 45-46; De Clercq, *Recueil des Traités de France*, II, 400, 402; Martens, *Nouveau Recueil de Traités*, Tome II, 110, 605-607; Angeberg, *Le Congrès de Vienne et les Traités de 1815*; Metternich, *Mémoires*, I, 182.

⁶ For the judgments of the Leipzig Supreme Court, see this JOURNAL, Vol. 16 (1922), p. 674, and for the British report thereon, see *ibid.*, p. 628. See also the writer's editorial in this JOURNAL, Vol. 15 (1921), p. 440.

⁷ The list of the accused included Generals Hindenberg, Ludendorff and von Mackensen, Prince Rupprecht of Bavaria, the Duke of Württemberg, ex-Chancellor Bethmann Hollweg, and a number of admirals, including von Tirpitz. "When the list was communicated to Baron von Lersner and made public in Germany it aroused such opposition that the Baron declined to deliver it to his government and announced his intention of resigning. In the face of an opposition which threatened to render impossible the execution of this provision of the treaty, the Supreme Council agreed to allow the accused to be tried by German courts. In consequence, the whole project for the trial of the Germans in the courts of the Allied and Associated Powers fell to the ground." J. W. Garner, *loc. cit.*, p. 77.

For a fuller account of the attempts to carry out these provisions of the Treaty of Versailles, see article entitled "Trial and Punishment of Axis War Criminals," by Sheldon Glueck, in *Free World*, for November 1942, p. 138.

that "No person shall be prosecuted for participation in military measures prior to the signature of the armistice."⁸ The delegates who drew up and signed the armistice terms were professional men of arms. It does not seem out of place to suggest that possibly they did not view the acts of the invading armies in the same light as the civilian victims and consequently were loath to turn over men of their profession to the wrath of the victorious peoples.

The Governments of the United States and Great Britain recently announced their agreement upon a proposal to establish a United Nations Commission for the Investigation of War Crimes to be composed of nationals of the United Nations selected by their Governments. As explained by the Lord Chancellor in the House of Lords on October 7:

The Commission would investigate crimes committed against nationals of the United Nations, recording the testimony available, and the Commission would report from time to time to the Governments of those nations in which such crimes appeared to have been committed, naming and identifying, wherever possible, the persons responsible. The Commission would direct its attention in particular to organized atrocities; atrocities perpetrated by, or on the orders of, Germany in occupied France should be included. The investigation should cover war crimes of offenders irrespective of rank. The aim would be to collect material, supported wherever possible, by depositions or other documents, to establish such crimes, especially where they were systematically perpetrated, and to name and identify those responsible for their perpetration.⁹

President Roosevelt's statement released to the press on the same day added: "It is not the intention of this Government or of the Governments associated with us to resort to mass reprisals," that "the number of persons eventually found guilty will undoubtedly be extremely small compared to the total enemy populations," but "it is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organized murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith."¹⁰

This announcement is the culmination of a series of protests against repeated acts of individual and collective brutality committed by the occupying régimes in the invaded countries of Europe. The representatives of these countries in London, after conference at St. James' Palace, adopted on January 13, 1942, the following declaration:

The undersigned representing the Government of Belgium, the Government of Czechoslovakia, the Free French National Committee, the Government of Greece, the Government of Luxembourg, the Govern-

⁸ This JOURNAL, Supplement, Vol. 13 (1919), p. 98.

⁹ The London Times, Oct. 8, 1942, p. 8.

¹⁰ Department of State Bulletin, Oct. 10, 1942, Vol. VII, p. 797.

ment of the Netherlands, the Government of Norway, the Government of Poland and the Government of Yugoslavia:

Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a régime of terror characterized amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres,

And whereas these acts of violence are being similarly committed by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,

And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world,

Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force, or to overthrow national institutions,

(1) affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or of a political crime as understood by civilized nations,

(2) take note of the declarations made in this respect on 25th October, 1941, by the President of the United States of America and by the British Prime Minister,¹¹

(3) place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them,

(4) resolve to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.¹²

In his announcement to the House of Lords on October 7, the Lord Chancellor stated that in planning for the punishment of war crimes it is not intended to make the same mistake which made it difficult to obtain the surrender of the culprits in 1919 by postponing the demand until the final peace treaty is signed. "Named criminals wanted for war crimes," he said, "should be caught and handed over at the time of, and as a condition

¹¹ On Oct. 25, 1941, President Roosevelt denounced the execution of innocent hostages for isolated attacks on German soldiers, and Prime Minister Churchill promptly associated himself with the President's statement. (The London Times, Oct. 27, 1941, p. 4.) On Aug. 21, 1942, after receiving a communication from the representatives of governments in exile in London expressing the fear that crimes against their civilian populations had assumed the proportions and forms of extermination, President Roosevelt gave warning that the time will come when the invaders in both Europe and Asia "shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts." (Department of State Bulletin, Aug. 22, 1942, Vol. VII, p. 709.)

¹² Document issued by the Inter-Allied Information Committee, London, H.M. Stationery Office, 1942.

of, the armistice, with the right, of course, to require the delivery of all others as soon as supplementary investigations are completed."¹³ Assuming that custody of the accused can be thus obtained, or by occupying or sending military expeditions to the places in which they live, or by delivery from neutral countries in which they may seek asylum,¹⁴ the greatest obstacle to their trial and punishment would be overcome. Had this been accomplished in 1919, the penal provisions of the Treaty of Versailles could have been effectively carried out.

The inter-Allied declaration of January 13, 1942, was communicated to the Soviet Government by a joint note from the signatories. On October 14, 1942, V. Molotoff, People's Commissar for Foreign Affairs, issued a statement of the intention of his Government to take similar action and stated that "the Soviet Government is prepared to support practical measures towards this aim taken by the allied and friendly Governments and expects that all the interested States will mutually assist each other in searching for, extradition, prosecution and stern punishment of the Hitlerites and their accomplices guilty of the organization, encouragement or perpetration of crimes on occupied territory."¹⁵

Granting the custody of the accused to the Allies by any or all of the means above suggested, many legal questions of jurisdiction, procedure, etc., may be and have already been raised, which will not be discussed here.¹⁶ The

¹³ The London Times, Oct. 8, 1942, p. 8.

¹⁴ "In regard to extradition," the Lord Chancellor stated, "there was not any private right of asylum recognized in international law. A fugitive criminal who managed to get over the border into some other country was not thereby entitled to claim to stay there. It was perfectly competent to the country that received him, whether there was an extradition treaty or not, if it thought its duty to the world or its conception of public policy required it to hand the criminal over." (*Ibid.*)

In this connection, the reply of the Dutch Government to the Allies' request for the surrender of the ex-Kaiser is of interest: "This Government cannot admit any other duty than that imposed upon it by the laws of the Kingdom and national tradition." It added: "Holland has always been regarded as a refuge for the vanquished in international conflicts" and the Government could not refuse "to the former Emperor the benefit of its laws and this tradition" and thus "betray the faith of those who have confided themselves to their free institutions." N. Y. Times Current History, Vol. XI, Pt. II, March, 1920, p. 377.

¹⁵ In the course of his statement, Molotoff said that all mankind is already aware of the names of the ringleaders and organizers of German atrocities, naming specifically Hitler, Goering, Hess, Goebbels, Himmler, Ribbentrop, Rosenberg, and that "The Soviet Government considers it necessary that any one of the leaders of fascist Germany who in the course of the war already has fallen into the hands of authorities of States fighting against Hitlerite Germany be brought to trial without delay before a special international tribunal and punished with all the severity of criminal law." (Inter-Allied Review, Oct. 15, 1942, Vol. II, No. 10, p. 236.) On Nov. 2, 1942, the Presidium of the Supreme Soviet established an Extraordinary State Committee for the investigation of crimes committed by the invaders. For the text, see Information Bulletin issued by the Embassy of the U.S.S.R., Washington, Nov. 10, 1942, p. 3.

¹⁶ For instance, see Viscount Maugham's statement of some of these questions in the House of Lords, Oct. 7, 1942. The London Times, *ibid.*

Peace Conference at Paris in 1919 had these questions before it and, after due consideration of the legal problems involved, decided to bring the accused persons to trial before military tribunals of the Powers against whose nationals the criminal acts were committed (Articles 228-229 of the Treaty of Versailles).¹⁷ The unnecessary interjection of legal technicalities will make more complex the execution of what the representatives of the governments concerned have solemnly declared to be one of the principal aims of the war and will tend to encourage hope in the minds of the offenders that present-day Allied leaders will follow the example of 1918-1919 and make blunders which will thwart the demands of their peoples for retributive justice. Ample law and precedents, as well as adequate jurisdiction, are believed to exist in the common law of war, in international conventions, and in the manuals of war of the belligerents for the trial and punishment of all offenses which have been committed and which it may be desirable or advisable to punish.¹⁸ The Hague Convention previously cited provides that "Prisoners of war are in the power of the hostile government" (Article 4), and that "Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are" (Article 8).

There does not seem to be involved now the question of trying the head of a state for a political offense such as was proposed in the case of the German Kaiser in 1919. It is now proposed, however, to try and punish the "ring-leaders." If this means the responsible authorities of the enemy States under whose orders or direction crimes and atrocities have been perpetrated, their indictment before military tribunals should be feasible on the well-known principle of law *respondet superior*.¹⁹

The position of the lawyer is, above all, to be solicitous that the law be respected, regardless of technicalities. This applies with even greater force

¹⁷ This JOURNAL, Supplement, Vol. 13 (1919), pp. 250-251. For the report of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, upon which these articles of the treaty were based, see this JOURNAL, Vol. 14 (1920), pp. 95-154. See, also, the memorandum prepared by the writer of this editorial while he was Assistant Technical Adviser to the American Commission to Negotiate Peace at Paris in 1919 "regarding the responsibility of the authors of the war and for the crimes committed in the war" (reproduced in Hunter Miller, *My Diary at the Peace Conference at Paris*, Vol. III, pp. 458-524), and his editorial in this JOURNAL on "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes," Vol. 14 (1920), p. 218.

¹⁸ See the extended treatment of this subject in the recent decision of the Supreme Court of the United States in the case of the German saboteurs. This JOURNAL, *infra*, p. 152.

¹⁹ This principle was repeatedly invoked by the German Supreme Court at Leipzig in excusing the acts of members of the German armed forces accused of war crimes under the Treaty of Versailles, the court in each case citing the German Military Penal Code. (This JOURNAL, Vol. 16, pp. 674-724.) In one case the court said that "according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible." (*Ibid.*, pp. 721-722.) See the writer's editorial on "Superior orders and war crimes," in this JOURNAL, Vol. 15 (1921), p. 440.

to the international lawyer in whose science the means of penal enforcement are not as yet well organized. As the Lord Chancellor said in ending his statement on the punishment of war crimes in the House of Lords on October 7 last:

When, therefore, this world war at length reached its conclusion—the only conclusion which we men and women could ever accept—the world would have to face a choice between alternatives. These were that either the efforts of centuries to establish and observe decent conduct in occupied territories were to come to an end and were to fall back into something even worse than the barbarities of the Middle Ages, or else that those nations which realized that world progress depended on preserving the decencies of conduct must undertake and observe the duty which fell to them not of sponging over these frightful things but to note them and do their best, as we and our Allies would do, to show that they could not go unpunished.²⁰

GEORGE A. FINCH

ASPECTS OF THE SABOTEUR CASES

The extended opinion by Mr. Chief Justice Stone, of October 29, 1942, in the Saboteur Cases¹ has significance in relation to international law and to the American conceptions of it, quite apart from the conclusion on the constitutional question that was before the court.²

It is said that "from the very beginning of its history this court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations, as well as of enemy individuals."

It is added that by the Articles of War, and especially Article 15, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." Somewhat later it is observed that "it is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." Here is impressive judicial testimony to the effect not only that the law of war as a part of the law of nations is a part of the local law, but also that its applicability by the courts in reference to penal matters need not await precise legislative appraisal or definition.³

²⁰ The London Times, Oct. 7, 1942, p. 8.

¹ Ex parte Quirin; Ex parte Haupt; Ex parte Kerling; Ex parte Burger; Ex parte Heinek; Ex parte Thiel; Ex parte Neubauer, 63 S. Ct. 1, this JOURNAL, *infra*, p. 152.

² The question for decision was—to quote the Chief Justice, "whether the detention of petitioners by respondent for trial by Military Commission, appointed by order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States."

³ In this connection the Chief Justice referred to the action of Congress in rendering punishable "the crime of piracy as defined by the law of nations," as an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, to "define and punish" the offense since it had adopted by reference the sufficiently precise definition of international law.

The petitioners in the instant case were charged (among other things) with the violation of the law of war, and with that of Article 82 of the Articles of War, defining the offense of spying. This led to discussion by the court of the place of spying in the law of nations, and of the theory on which the spy is punishable by his captor.

According to Article XXIV of the Hague Regulations of 1907, annexed to the Convention of that year respecting Laws and Customs of War on Land: "Ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered permissible."⁴ According to Article XXIX: "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."⁵

According to the War Department Rules of Land Warfare, the foregoing regulations "tacitly recognize the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy." It is added: "Resort to that practice involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible for the enemy."⁶ This statement is perhaps a natural response to two factors—the "practice" of employing spies, and the habitual punishment of spies when captured.⁷ It emphasizes the character of State conduct without touching upon the character of that of the individual who acts as a spy. It serves also as a warning against a blithe conclusion that would stamp as internationally illegal the acts of a State which are illustrative or typical of old and still existent practices. Yet it leaves without adequate explanation the denial to the captured spy of the full privileges that are normally accorded a prisoner of war. If the conduct of the individual spy does not differ from, and is no worse, in legal contemplation, than that of his employer, captured spies would find themselves subject

⁴ Malloy's Treaties, II, 2286.

⁵ *Id.*, where it is added: "Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory."

⁶ No. 204, 1934 edition, and No. 203, 1940 edition. See also Lauterpacht's 6th ed. of Oppenheim, II, § 159.

⁷ Declares Winthrop: "The employment of spies is not infrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare." Military Law, 2d ed., 1920, Sec. 1200. Yet that writer also observes: "A spy under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such." (*Id.*, Sec. 1197.) He adds: "By the law of nations the crime of a spy is punishable with death." (*Id.*, Sec. 1199.)

to punishment as a penalty for acts that were not internationally wrongful. Such a consequence might lead to dire results.

The Supreme Court in the instant case makes a different approach by accentuating the character of the act of a spy. It calls attention to the distinction which "by universal agreement and practice the law of war draws . . . between those who are lawful and unlawful combatants." The distinction is thus one that is seemingly international, in the sense that it is imputed to the law of war. Lawful combatants are said to be subject to capture and detention as prisoners of war by opposing military forces. Then come the following impressive words:

Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.⁸

It is thus apparent that because, in the mind of the court, the spy is an offender against the law of war he is subject to trial and punishment by military tribunals. This conclusion has much significance. It suggests that the treatment of a spy less favorably than that of a prisoner of war is simply due to the nature of his act which, according to the law of war, suffices to brand the actor as an unlawful combatant. This is a bold and fresh view; for the Supreme Court imputes to the law of nations (or to the law of war as a part thereof) the injunction against the act of spying. In so doing it is uninfluenced by the circumstance that belligerent States constantly employ spies with full appreciation of what awaits them if captured.⁹

⁸ After noting that the definition of lawful belligerents in paragraph 9 of the Army Rules of Land Warfare is that adopted by Article I of the Annex to Hague Convention No. IV of October 18, 1907, to which the United States became a party, and after quoting the preamble to that convention, the court declared: "Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear 'fixed and distinctive emblems.' And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to the 'law of war.'"

⁹ Because of this circumstance it may be asked how it is possible to reconcile statements which acknowledge the propriety of State conduct or practice in employing spies with the conclusion that the act of a spy is violative of the law of war and hence internationally illegal. It may not be possible to do so in point of logic. It seems indeed grotesque for a State to say to its soldier: "We authorize and want you to do a thing which the law of war forbids and which, if you violate its prohibition, will subject you, if captured, to summary treatment." Yet this is just what in fact happens; and because it happens there may be

In such fashion the court is consciously or otherwise bearing testimony to the fact that the law of nations may, and oftentimes does, address its injunctions to individuals by attaching an internationally illegal quality to particular acts. It is needless to cite instances. Professor John Bassett Moore impressively adverted to some in 1912.¹⁰ Now, thirty years later, the Supreme Court points to another.

CHARLES CHENEY HYDE

CONTROL OF AËRIAL NAVIGATION

Some problems in regard to the use of the air arose in the earlier centuries, but the 20th century has been a period of rapid development in aërial navigation. Even the Hague Conference of 1899 had proposed regulations which were observed in the Russo-Japanese war of 1904. Further rules were proposed at the Hague Conference of 1907. At this conference the wise legal adviser of the French Foreign Office, Louis Renault, looking forward, said, "Aërial navigation is making such progress that it is impossible to foresee what the future has in store." Some rules regulating the use of aircraft in time of war were then proposed and received the support of a few States, but the need of more detailed regulations was evident. On recommendation of the Washington Conference on Limitation of Naval Armament in 1922, a Commission of Jurists was appointed and submitted rules for the control of radio and for aërial warfare in 1923. These were not adopted even though the need of regulations was admitted.

Manifestly the operation of aërial forces, save under exceptional conditions, might involve the jurisdiction of more than one State; accordingly some form of collective control was suggested. Proposals came before the Conference for the Reduction and Limitation of Armaments in 1932. At that time France, though having a large air force, affirmed,

No substantial reduction of armaments can be brought about by empirical and technical means. Whoever desires the end—and the end is essential—must also desire the means. There must be a change of method; in the future we must seek in common action that security which each nation has hitherto endeavored to obtain from its own force alone.

reason to modify the law of war and regard the spy as in no worse a light than the State which urges and authorizes him to become one for the sake of its own public cause.

¹⁰ In the course of his illuminating article on "Contraband of War" published by the American Philosophical Society in 1912, he trenchantly declared: "Merchandise is not confiscated, voyages are not broken up, ships are not condemned, for acts that are innocent; these severe and destructive inflictions are penalties imposed for acts that are unlawful. . . . Obviously the determination of the question whether an act is lawful or unlawful depends not upon the circumstance that the right or duty to punish it is committed to one agency or another, but upon the fact that it is or is not punishable. The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful."

As an evidence of good faith in the proposition which France had made, her delegates advocated as a general policy the placing of "civil aviation and bombing aircraft" under collective control, to which her aerial forces would be submitted.

The German representative, stating that a system of disarmament to be effective "must be equally applicable to all countries," proposed that the "maintenance of air forces of any kind be forbidden."

The Soviet delegation, in a more comprehensive plan for "real security," advocated "the general, complete and rapid abolition of all armed forces."

Since 1939 military forces have to a considerable degree been placed under collective control and have often been operating far from their respective national boundaries, and question has been raised as to the special value of such units as flying fortresses except under collective control for regional action.

As to the use of aerial forces, is it still necessary to go back to Renault and say "it is impossible to foresee what the future has in store"?

GEORGE GRAFTON WILSON

NATIONALIZATION OF ENEMY PATENTS

The Alien Property Custodian has recently announced that the "tens of thousands"¹ of "enemy" patents which have been seized by the United States Government are to be held as a "permanent possession of the American people." In a letter said to have been sent to American trade associations and industries, the Custodian invites American industry to apply for non-exclusive licenses to these patents which "we shall make . . . a permanent part of our industrial machinery by refusing to sell them or release title in any way." After calling attention to the "great economic value" in these patents and in the "pending patent applications which represent the latest researches," also to be licensed when granted, the Custodian indicates that they will not only be put to work for existing war production but also for converting plants from peacetime to war activities. He offers "technical assistance to American business in bringing these patents into effective use," and offers to defend the licensees in any suits brought against them for alleged patent infringement. The proposed system also apparently contemplates the appropriation of patents belonging to nationals of countries occupied by the Axis Powers. But as to these, it is expressly stated that the interests of their owners would be safeguarded by making them royalty-free only for the duration of the war and for six months after its close. After

¹ John MacCormac in New York Times, Dec. 20, 1942, p. 20. They are said to number approximately 50,000. This number includes patents owned by nationals of Axis-occupied countries. Where pre-war exclusive and non-exclusive use licenses of actual enemy patents are already in existence, the royalties involved will be collected by the Custodian, but the licensee will have the option of canceling his exclusive contract and taking instead a standard, non-exclusive, royalty-free license. Licensees pay a basic \$50 fee. White House press release Dec. 8, attaching Report of Custodian Dec. 7, 1942.

that, royalties "which are reasonable on a basis of prevailing commercial practice" will be charged on non-exclusive licenses to be issued for the life of the patent.

It thus appears that privately owned patents belonging to nationals of enemy States or of countries occupied by the enemy, are to be expropriated without compensation for the benefit of American industry, royalties being exacted only on those patents belonging to nationals of occupied States subsequent to the period beginning six months after the termination of the war.

If the proposed procedure is correctly understood, it looks as if private inventors and owners are to have their rights in patents confiscated. This goes further than the practice of the last war, in which the Alien Property Custodian sold to the Chemical Foundation some 4,500 patents, some valuable, at \$50 each. That transaction, which Attorney General Stone, prosecuting the Chemical Foundation in the Circuit Court of Appeals, condemned as subversive of the future of the country,² was nevertheless sustained by the Supreme Court.³ A vast body of literature was published after the War of 1917, pointing out the reciprocally destructive effects of the unlawful practice of confiscating private property and the ominous portents to the future of international investment, trade, coöperation and peace which the practice necessarily implied.⁴

The policy with respect to foreign, particularly German patents, may have been partly motivated by the fact that the technological advance of the German chemical and drug industry has given the businessmen of that country a superior bargaining power, incidental to patent control, in concluding cartels and marketing agreements with foreign companies, a power, it has been said, coöordinated in many instances with the economic policies of the German Government.⁵ It is charged that patents have often been used to insure dependency on Germany for vital medicines, to block non-German research, to block newcomers in the field and to fix prices.⁶

The question arises whether the protection of the American manufacturer and consumer against these abuses of the patent system could not be obtained, without confiscation, by a modification of the patent system, already under study, for example, possibly by compulsory licensing, by an obligatory public submission for approval by a federal administrative bureau of any cartel and private licensing agreements, by limiting the scope of the

² Oral Argument of Harlan F. Stone; Brief on behalf of Appellant, United States of America, C.C.A. 3rd circ., March 1924, pp. 499.

³ 272 U. S. 1 (1926).

⁴ Cf. Gathings, James A., *International Law and American Treatment of Alien Enemy Property*, Washington, D. C., 1940, and literature there cited, p. 131 *et seq.*

⁵ *The Strange Case of Sterling Products*, by Walton Hamilton, *Harper's* for January, 1943, p. 123.

⁶ The Custodian announces that the "use [of the patents] in the furtherance of any monopoly or any similar exploitation contrary to the public interest" is to be prevented.

monopolistic privileges necessarily attached to a patent.⁷ Even short of such changes, which the 78th Congress may consider, it would seem that the advantages of American emancipation from foreign monopoly could be accomplished by compelling licensing *with* compensation, as contemplated by S. 2491, or by some means other than drastic nationalization, against which the United States has vigorously protested when undertaken by other countries.⁸

American statesmen throughout American history seem to have been aware of the disintegrating effects of confiscating enemy private property and have stoutly defended the rule of law which prohibited confiscation. Nothing more profound on this subject has been uttered than the statements of Alexander Hamilton in support of Article 10 of the Jay Treaty with Great Britain of 1794,⁹ prohibiting the confiscation of private property. That the country as a whole is not committed to such violations of international law and economic good sense is indicated by the statement of Secretary Hull as late as May 27, 1935:

Such action would not be in keeping with international practice and would undoubtedly subject this Government to severe criticism. Moreover, the confiscation of these private funds by this Government and their distribution to American nationals would react against the property interests (some very large) of American nationals in other countries. It would be an incentive to other governments to hold American private property to satisfy claims of their nationals against this Government and to pass upon such claims in their own way. It is important from my point of view, therefore, that the United States should not depart in any degree from its traditional attitude with respect to the sanctity of private property within our territory whether such property belongs to nationals of former enemy powers or to those of friendly powers. A departure from that policy and the taking over of such property, except for a public purpose and coupled with the assumption of liability to make just compensation, would be fraught with disastrous results.¹⁰

⁷ This was the purpose of S. 2491, 77th Cong., 2d Sess., introduced by Senators O'Mahoney, Bone and La Follette, April 28, 1942. Hearings before Senate Committee on Patents, 77th Cong., 2d Sess., 8 parts.

⁸ See, e.g., Secretary of State Hughes' address at Philadelphia, Nov. 23, 1923, in referring to Mexican confiscations: "A confiscatory policy strikes not only at the interest of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful coöperation, is possible. . . . Rights acquired under its laws by citizens of another State, [a State] is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles." This JOURNAL, Vol. 18 (1924), p. 523, at p. 531.

⁹ See Works of Alexander Hamilton (Lodge's edition), Vol. V, p. 412 *et seq.* See the extended quotations from Hamilton and the references to the treaties concluded by the United States in Moore, John Bassett, International Law and Some Current Illusions (New York, Macmillan, 1924), p. 14 *et seq.* See also editorial in this JOURNAL, Vol. 18 (1924), p. 523, at 528, 529 (July 1924).

¹⁰ Secretary Hull to Senator Capper, May 27, 1935, this JOURNAL, Vol. 31 (1937), p. 680.

Citizens of the United States now have invested abroad some 11 billion dollars in direct investments and 4 billion dollars in indirect or portfolio investments. This country should therefore exert its influence to prevent the further corrosion of the institution of private property, since the United States and its citizens have more to lose by confiscation than any other country. If the safety of private property is to depend not on law but on the preponderance of force, there can be no end to the war system. It has often been said that the struggle to maintain elementary virtues is unceasing. The experience of Europe during the last decade lends support to the view that there never is any assurance of the permanence of social and legal advances. But in the face of the Secretary of State's repeated declarations that one of our aims is the "revitalizing of international law," it is hardly fitting that administrative officials of the United States should, wittingly or not, deliberately impair those institutions.

The implications of economic war do not appear to have been fully considered.¹¹ A war on private property has not since the 18th century been considered either legal or sensible, since it reciprocally undermines post-war relations. Faced with the desire and purpose not to aid the enemy, international law had reached the practical compromise of permitting, though not commanding, a refusal to allow enemy nationals to derive benefits *during war* from their property abroad, but guaranteeing its safety against confiscation. If it did not have reciprocal advantages the institution would never have grown to such assumedly impregnable proportions. But with a general weakening of the respect for law manifest in recent times, no one can predict how much deterioration in established institutions will ensue. If the Custodian's practice is confirmed as national policy—although Congress, which has exclusive power,¹² seems not to have authorized confiscation—that termination of economic war which Mr. Pasvolsky of the Department

¹¹ See, in this connection, Recommendation No. VII of the Inter-American Conference on Systems of Economic and Financial Control, Washington, June 30–July 10, 1942, in which the countries of this continent are advised to "eliminate from the commercial, agricultural, industrial and financial life of the American Republics . . . the business, properties and rights of any real or juridical person . . . whatever their nationality," who are "acting against the political and economic independence and security of such Republics." The meaning of the last clause is unclear. The far-reaching character of this recommendation, which possibly includes all persons and firms on the blacklists, warrants consideration by international lawyers. The extent to which it has been followed by legislation or administrative action it has not been possible to establish.

¹² *Brown v. United States* (1814), 8 Cranch 110. It is not believed that confiscation is authorized by the admittedly broad terms of Sec. 301 of the First War Powers Act (55 Stat. 840): ". . . upon such terms and conditions as the President may prescribe such interest or property [of *all* aliens] shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, . . ." Executive Order 9095, establishing the Office of Alien Property Custodian, gives him ambiguous authority to "vest" any foreign property.

conquest, more loss of life and property through war, in North America, in South America, and in Asia than in Europe.⁵ Under the balance of power system, Europe was relatively tranquil and prosperous. The remainder of the world was more restless and belligerent, though, with the exception of Africa, it shared in the increases in population and prosperity which characterized the world as a whole during this period.⁶

Many feel a nostalgic desire to return to the conditions of that fortunate century. Many point out that the principles of national self-determination and international organization upon which the Treaty of Versailles was based, proved less enduring than the principles of legitimacy and balance of power which underlay the Vienna settlement. Recent books and articles have set forth with skill the geographic, economic, and strategic conditions which statesmen should keep in mind under the assumption that the balance of power will be the political basis of the settlement after World War II.⁷

For these reasons it is important to consider whether the conditions which made the balance of power a successful system of world politics in the nineteenth century still prevail. Has there been adequate reason for the widespread revolt against that system which has developed in the twentieth century?

In the writer's opinion the balance of power can no longer function effectively. The alternatives which the world faces are an imperial organization of the world by conquest, or a federalistic organization of the world by general consent. These alternatives constitute the issue about which the war is being fought.

It is important that the international lawyer adjust his thinking both to the kind of world which is likely to emerge and to the possible world which he would prefer. If rights of territorial sovereignty and self-help, if national policies of intervention and neutrality, and if a world political structure of balanced military power no longer accord with practice, with conditions or

⁵ In addition to the Taiping, American Civil and Lopez wars, in each of which the war deaths were over 600,000, there were six wars during the period in which such losses were from 100,000 to 200,000 (Crimean, 1854-1856; Italian, 1859; Franco-Prussian, 1870-1871; Russo-Turkish, 1878-1879; Russo-Japanese, 1904-1905; and Balkan, 1912-1913), and three wars in which such losses were from 30,000 to 60,000 (Russo-Turkish, 1828-1829; Austro-Prussian, 1866; and South African, 1899-1901). Of these twelve most serious wars, two were fought in the Americas, one in Africa, two in the Far East, four in the Near East and three in Western and Central Europe. Of a total of 87 wars during this period, 17 were fought in North and Middle America, 10 in South America, 7 in South and Central Africa, 8 in the Far East, 8 in the Middle East, 20 in the Near East, and 17 in Western and Central Europe. See Q. Wright, *op. cit.*, pp. 644-646; Samuel Dumas and K. O. Vedel-Petersen, *Losses of Life Caused by War*, London, 1923, pp. 40-59.

⁶ Q. Wright, *op. cit.*, pp. 599, 612.

⁷ Nicholas J. Spykman, *American Strategy in World Politics*, New York, 1942; Arnold Wolfers, "Anglo-American Post War Cooperation and the Interests of Europe," *American Political Science Review*, August, 1942, Vol. 36, p. 665; Guglielmo Ferrero, *The Principles of Power: the Great Political Crises of History*, New York, 1942.

with human interests, if a new political structure of the world is imminent, important modifications in the principles of international law are to be anticipated.

This is not the place to examine the subject in full. Suggestions concerning the international law of the post-war world have been made by several of the editors of this JOURNAL in the preceding issue. A comparison of their views⁸ encourages the writer to make a few comments upon the factors which militate against successful reestablishment of the form of military equilibrium which characterized the post-Vienna world. If these reasons appear cogent, it may be easier to perceive the outlines of the future political structure which will meet the situation, and from that to deduce the modifications in the current formulations of international law which will be required.

The writer does not intend to imply that the legal system of a community is entirely determined by the political system of that community. Political and legal systems influence one another, and both are influenced, though sometimes rather slowly, by economic, social, and technical changes. We may be sure that the political system after World War II will be influenced by the traditional concepts of international law, though we may hope that it will be influenced in greater measure by the requirements of new economic, social and technical conditions.⁹ We may, however, expect that the direction of change in international law will be influenced primarily by the system of world politics which prevails. By a system of world politics is meant the interrelationships of the actual centers of political power.¹⁰

The most significant changes in the 19th century were the inventions in communication and transportation, the systematic application of industrial

⁸ H. W. Briggs questions whether international law can succeed if it consists of a "series of prohibitions against the power politics of states" (this JOURNAL, Vol. 36 (1942), p. 639). Edwin Borchard, believing that "law plays only a minor part in international social control" and that the national state is likely to remain for some time "the unit of the international constellation," doubts whether "community or group force" can be substituted in place of "nation-force" (*ibid.*, pp. 629-630). Philip Marshall Brown, on the other hand, objects to those who "contemn the law of nations as something negligible." He attributes this attitude to the positivistic tendency which puts treaty law ahead of custom but he leaves some doubt as to the relation of the two when he writes: "With very rare exceptions . . . treaties do not create international law, but confirm and register established usage. Treaty-made law necessarily represents diplomatic compromises and frequently reveals gross inconsistencies with accepted usage." (*Ibid.*, p. 634.) Clyde Eagleton assumes that the future of international law can only be foreseen by studying the relation of changing technical, social and economic conditions to permanent human interests. (*Ibid.*, pp. 640-643.) Briggs expresses a similar idea though, like Borchard, he appears to assume that traditional power politics can not be controlled by law. In this he differs from Elihu Root, "The Outlook for International Law," *Proc. Am. Soc. Int. Law*, 1915, p. 2 ff.

⁹ Q. Wright, *op. cit.*, pp. 341-346, 351-356, 891-894. On the influence of changing conditions upon state policies see *ibid.*, 1255-1260 and upon international law see *ibid.*, pp. 907, 922, 975-986.

¹⁰ *Ibid.*, *op. cit.*, pp. 743 ff., 935-939, 1022.

and geographic division of labor, the tremendous increases in production and in population, the rise of ideas of democracy and of nationality, and finally the industrialization and totalitarianization of war. These changes were not entirely independent of one another. The increase in communication and transportation resulting from inventions influenced the division of labor, the increases in population, production and trade, and the character of war. The progress of democracy and the increase of wealth stimulated inventiveness. The rise of nationalism influenced and was influenced by changes in the character of economy, of war, and of communication.

It is not, however, to be inferred that these movements were all consistent with one another. Nationalism at times supported and at times opposed democracy and liberty. Both democracy and international trade found their progress halted by the totalitarianization of war and the exaggerations of nationalism.¹¹ Whatever may have been the causes and the interrelationships of these changes, their reality is susceptible of statistical demonstration,¹² and their combined influence has been hostile to the successful functioning of the balance of power system.¹³

That system worked well during the nineteenth century because one power, Great Britain, was in a peculiarly favorable position to act as a balancer and did so act; because governments in general were free to direct policy rapidly and intelligently according to balance of power principles; because trade, industry and agriculture were relatively unaffected by diplomacy and war; and because wars could usually be localized and neutrality was frequently practicable. The great changes of the 20th century affected all these conditions adversely. Britain's island base has been made vulnerable by the airplane and the submarine; its navy has been made less effective for blockade because of these inventions and various changes in naval architecture; its capacity to operate the balance of power efficiently has been weakened by the increasing influence of democracy in the conduct of foreign policy; its free commercial system and its wealth have been impaired by the governmentalizing tendency of nationalism and of total war; its relative power position has been diminished by the rise of extra-European Great Powers (United States and Japan). Britain is no longer in a position to throw a determining influence one way or the other in order to sustain the balance while it, itself, remains invulnerable.¹⁴

It has been suggested that the United States might step into the rôle of balancer.¹⁵ While less vulnerable than Britain to either military or economic attack, the United States is politically even less able to make the rapid and

¹¹ *Ibid.*, pp. 364-371.

¹² These tendencies can be traced back to the Renaissance period, but they became much more important during the 19th century. *Ibid.*, pp. 166-167, 204-212, 303-313, 612-614.

¹³ *Ibid.*, pp. 765-766, 859-860.

¹⁴ *Ibid.*, pp. 298-299; Q. Wright, "The present status of neutrality," this JOURNAL, Vol. 34 (1940), pp. 413-414.

¹⁵ Spykman, *op. cit.*, pp. 468-472.

secret maneuvers upon which a successful balancing of power depends. Elihu Root pointed out in 1917:¹⁶

Because democracies are not fitted to conduct foreign affairs as they were conducted in de Tocqueville's day, the prevalence of democracy throughout the world makes inevitable a change in the conduct of foreign affairs. Such affairs when conducted by democratic governments must necessarily be marked by the absence of those undertakings and designs, and those measures combined with secrecy, prosecuted with perseverance for which he declares democracy to be unfit.

"Democracies," according to Root, "are absolutely dependent for their existence upon the preservation of law." American foreign policy has in fact developed upon the assumption that the government, limited by the check and balance system of the Constitution, neither could nor ought to play the game of power politics. In the past, policies of isolation and neutrality, combined with reliance upon law and arbitration, were in the main satisfactory but they failed under the new conditions of the 20th century world. These policies were in considerable measure abandoned after the Spanish war and the effort to return to "normalcy" during the 1920's led to both economic and political disaster.

The history of the 1930's demonstrated the vast superiority of despotisms over democracies in the game of power politics. Hitler, Mussolini and Japan were able to hold together and to divide and confuse the democracies, while they augmented their armaments and took one strategic position after another. In an age in which democracy insists on extending the influence of public opinion to the control of foreign as well as domestic affairs, democracies cannot compete successfully in a world governed by balance of power principles. They may eventually fight successfully, but they can neither frighten nor appease the despotisms; they can neither prevent nor localize war, and to win war they must sacrifice much of their democracy. Under conditions of total war and the balance of power system, democracy can function successfully neither in time of peace nor in time of war. If democracy and human liberty are to survive, the nations that espouse these principles must find some device other than the balance of power to give them political security.¹⁷

The balance of power system, under contemporary conditions, is even more hostile to international trade and free economy than it is to democracy and liberty. In the 19th century wars seldom involved over ten percent of the economy and manpower of the nation. Internal trade ordinarily went on as usual, and even international trade was in large measure protected by rules of maritime law. Belligerents found it in their interest to distinguish the armed forces and the government of the enemy from its merchants, workers,

¹⁶ Elihu Root, "The Effect of Democracy on International Law," *Proc. Am. Soc. Int. Law*, 1917, pp. 7, 9.

¹⁷ Q. Wright, *A Study of War*, pp. 262-269.

and farmers, since the latter contributed little to the military effort. Exemptions of the latter from the rigors of war, though never pushed as far as Franklin would have liked, were important, and on the whole observed. Modern war, however, absorbs over half the economy and population of the State. The nation is mobilized for war, and the government directs economy and trade. Under these conditions no class of the enemy can be exempt from the rigors of war, and the neutrals must be prevented from even indirect trade with the enemy. Economic life is transformed during war, and military preparation for total war requires that even in time of peace nations must make themselves as self-sufficient as possible. Governments must intervene in the productive process to assure that war materials and factories will be available. In short, the balance of power system requires under modern conditions of war that every nation governmentalize its economy, devote its economy to increasing its power, forego the benefits of geographical division of labor, lower its general standard of living, and increase the strain between have and have-not nations, thereby adding to the economic causes of war.¹⁸

Under such conditions, neutrals may find peace worse than war, and all Powers with sufficient military potentiality to influence the result find it in their interests or are forced to enter the combat. Under a balance of power system, wars involving great Powers have always tended to spread. There have been very few during the last three centuries which did not eventually involve all of the great Powers of the time. The rate of spread, however, has markedly increased during the last generation with the shrinking of the world, the development of interdependence, and the industrialization of war.¹⁹

From these considerations, it seems clear that the balance of power as the structure of world politics is incompatible with democracy, with free enterprise, with welfare economy, and with peace. It has even come to be incompatible with the international law which, during most of the 19th century, supported it. These are the conditions which the international lawyer faces. Nostalgic sentiments, ancient customs, and artful dialectics will not modify the influence of modern inventions in communications, transportation and war. Nor will they eliminate the existence of a world population dependent for its living upon an extensive international trade and demanding more freedom, more political influence and more prosperity.

It was not utopianism which led Wilson and Smuts in 1918, and has led Churchill and Roosevelt in 1941, to encourage the public to believe that the balance of power was to be superseded. These men understood that the conditions of the world made that system no longer adequate. We have witnessed during the 20th century the familiar lag of political and legal ad-

¹⁸ Q. Wright, *A Study of War*, pp. 281-285, 307-310, 317-319, 1168-1172.

¹⁹ *Ibid.*, pp. 237-242, 647-650.

justment behind economic, social and technical changes. The insight of Wilson and Smuts was not appreciated, and efforts were made to rehabilitate the balance of power, with the results which were to be anticipated. It is to be hoped that the insight of the present leaders of democracy will be more widely understood.

QUINCY WRIGHT

CURRENT NOTES

JESSE SIDDALL REEVES

1872-1942

Jesse Siddall Reeves, for many years Vice-President of the American Society of International Law and a member of the Board of Editors of its *JOURNAL*, died July 7, 1942, after having rounded out a useful, happy, and successful life of more than the allotted three score years and ten. I use the words "rounded out" advisedly, for Jesse Reeves was preëminently an example of the Greek ideal of universality. His interests were as multifarious as his attainments were significant.

He was born on January 27, 1872, at Richmond, Indiana. He came of fine old colonial stock. His parents were leading citizens of the community. No one could be better born. At a very early age he entered the Preparatory Department of Earlham College and later spent a year in Earlham College. Thereafter he transferred to Kenyon College and completed his course at Amherst, receiving his B.S. degree from Amherst in 1891 and his doctor's degree in History from Johns Hopkins in 1894. Later on Amherst, his Alma Mater, was to confer on him the honorary degree of Doctor of Humane Letters, and Williams College the honorary degree of Doctor of Letters. While still a graduate student at Johns Hopkins he had served as Instructor in American History in Woman's College (now Goucher) from 1893 to 1894, but in 1897 he entered the practice of law in his native city of Richmond, Indiana, and pursued it for ten years, taking an active part in public and political affairs in his native city and acquiring thereby much practical wisdom which was later to profit his students. But he was at heart a teacher of political science rather than a practicing lawyer. In 1905-1906 he interrupted his legal practice to lecture on Diplomatic History at Johns Hopkins University, and in 1907 he definitely abandoned the active practice of the law for an academic career by accepting an appointment as Assistant Professor of Political Science at Dartmouth College. In 1910 he went to the University of Michigan as Chairman of the Department of Political Science and entered upon his life work there which only closed with his automatic retirement from the Michigan faculty in February, 1942.

In 1899 he married Ellen Howell Griswold of Baltimore. Mrs. Reeves, a son, Arthur Griswold Reeves, a daughter, Mrs. Ellen Reeves Gage, and two granddaughters survive him.

Jesse Reeves was a teacher, and a distinguished teacher, but he was not merely a teacher as the following notations from his biography will amply demonstrate. He was Captain, Major, and Judge Advocate of the 20th Division in the World War. He was for years a member of the Board of Advisers and a Round Table leader at the Williamstown Institute of Politics.

He was lecturer at the Academy of International Law at The Hague in 1924; American member of the Pan American Commission of Jurists for the Codification of International Law in 1925-27; Technical Adviser to the American delegation to the Hague Conference on Codification of International Law, 1930. He was a member of the American Institute of International Law, the American Historical Association, the American Philosophical Society, the American Political Science Association, of which he was President in 1928, and *Associé, Institut de Droit International*, 1932. And last but not least in his affections and interest, he was a member and one of the leading spirits of the American Society of International Law from its first year and an Honorary Vice-President of the Society at the time of his death.

Mr. Reeves' scholarship and interest in the American Society of International Law are reflected in innumerable articles, addresses, editorials, and particularly book reviews scattered throughout the volumes of the JOURNAL and the Proceedings of the Society. The mere listing of his contributions takes up about a page and a half of the two volumes of the Analytical Index to the JOURNAL, Supplements and Proceedings. The variety of the subjects dealt with in his contributions was in itself remarkable and proof of the catholicity of his interests. Many of these contributions were interesting and timely comment upon current international events. Others, like his articles on Grotius, of whose works he was an editor (this JOURNAL, Vol. 19, (1925), pp. 12 and 251), and his work as reporter of the draft on diplomatic privileges and immunities for the Harvard Research in International Law (Supplement to the JOURNAL, Vol. 26 (1932), pp. 15-187), were works of painstaking scholarship.

Jesse Reeves was a scholar, and a distinguished scholar, but he was not merely a scholar. He was a scholar with wide human interests and who had not only the desire but the ability to present the results of his scholarship both in speech and in writing to the ordinary citizen in a way to make them both useful and attractive. An outstanding instance of this is his early monograph on American Diplomacy under Tyler and Polk, which he wrote while still engaged in the practice of the law. In a discriminating review of this work by Howard Lee McBain which appeared in Volume 3 of the JOURNAL, the reviewer, who was inclined to take issue with Dr. Reeves on some points, summed up his opinion of the work as a whole in the words, "a pre-eminently scholarly treatment," while at the same time the work was receiving favorable notice from the more thoughtful reviewers of the daily press who commended the book as good reading for the intelligent layman interested in foreign affairs.

Jesse Reeves was a teacher and scholar, but he was more than this—he was a man. Under a somewhat austere exterior his friends were not slow in discovering a ready wit and a tender heart, and as one of his Michigan colleagues has justly recorded, he was "ever ready to champion a just cause, no matter how humble its nature." He was one of those vivid personalities

whom those who knew him well will not soon forget. Life for them will be lonelier for his absence. In writing about his long-time friend, Professor Garner, in this JOURNAL for 1939 (p. 104), Jesse Reeves said, "His death comes as the grievous loss of a great teacher to his many devoted pupils, as a lasting deprivation to the scholars who have for so long a time enjoyed the fruits of his pen, and as a poignant blow to those both here and abroad who were privileged in his friendship." I can think of no more fitting words for his own epitaph.

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POST-WAR PLANS OF THE INTER-AMERICAN BAR ASSOCIATION¹

BY WILLIAM R. VALLANCE

Secretary General of the Inter-American Bar Association

Recognition of the great possibilities for usefulness possessed by the Inter-American Bar Association in connection with post-war problems was the outstanding feature of the meeting of the Council and Committees of the Inter-American Bar Association held in the Pan American Union Building, Washington, D. C., November 19-21, 1942. Despite difficulties of transportation and other war conditions, over 150 leaders of the bar assembled for the opening session in the beautiful Hall of the Americas. Dr. Leo S. Rowe, Director General of the Pan American Union, in his address of welcome stated "that the importance of greater uniformity in legal standards throughout the continent was realized early in the history of the American Republics and has been recognized in both diplomatic and technical conferences of a Pan American character." He expressed the opinion that juristic advances can be accomplished through this new organization, and "important results attained through closer acquaintance between individual jurists in different sections of the continent and through closer contact between their group organizations" which would further the cause of Pan American solidarity.

Speaking on behalf of the lawyers of Washington, Mr. Paul B. Cromelin, President of the Bar Association of the District of Columbia, extended a hearty welcome to the distinguished visitors and referred to the common pur-

¹ The Inter-American Bar Association was organized on May 16, 1940, at the close of the Eighth American Scientific Congress held in Washington, D. C. (See Conference Proceedings, pp. 202-203; 212-215.) The Inter-American Bar Association has announced the publication of two volumes, one in Spanish and the other in English, containing the Constitution, By-Laws, Organization Proceedings and the Proceedings at the First Conference of the Association held in Habana, Cuba, March 24-28, 1941. Each volume will be bound in cloth and will contain approximately 480 pages. Many important addresses by leaders of the bar of this hemisphere will be obtainable in these volumes of which a limited edition will be published. Single copies are \$3.00 each, or both volumes may be obtained for \$5.00. The volumes are edited by two distinguished legal scholars, the English edition by Dr. Lawrence Deems Egbert, and the Spanish edition by Dr. Raoul Herrera-Arrango.—W. R. V.

poses and common ideals, the mutuality of problems and similarity of difficulties, which have brought together the members of the profession in this hemisphere for the defense of our democratic way of government and life and for the study and development of plans for a permanent and enduring world peace.

The high aims and purposes of the Association were emphasized in the presidential address of Dr. J. Honorio Silgueira,² who is also President of the *Federación Argentina de Colegios de Abogados*. In view of the outstanding position of Dr. Silgueira in Argentina and his long and faithful efforts to unite the lawyers of the Americas, his recommendations are especially significant in these momentous days. He said that in the South as well as in the North and Central American nations the lawyers should be disposed to weld themselves together into collective strength. He said:

The Inter-American Bar Association, in coöperation with similar institutions, is in the singularly happy position to dedicate itself to this great task and to be the directive force in the attainment of the American ideal.

The establishment of cultural ties between the juridical associations of the twenty-two states, the formation of the inter-continental forum, the special dedication to the study of equity, the uniformity of laws wherever possible, the reciprocal knowledge of the laws of the American Republics, and the meeting of international conferences are and will be invaluable instruments for forging, as in an enormous crucible, the central thought of our unity and the fraternal vision of the future of the world.

Within these ideas and while the rule of justice is being restored and guaranteed anew on the earth, the jurists and their respective associations should continue to coöperate in the attainment of those aims which I mark for the consideration of the Council. . . .

The unity that our countries should follow—that which you and we seek both individually and collectively—is animated by a certain number of conceptions, especially those of the social, moral, and spiritual order.

In the juridic-cultural exchange which we are cultivating among Argentina, Brazil, and Chile, for example, we have used two means of performing this task which have characterized and differentiated two periods or cycles: That of "Understanding and a certain sentimentalism"; and that of "reciprocal friendship." The first, that of rapprochement of men and their communion of ideas we have already completely accomplished.

The theme of the second cycle is "learning and understanding." For this the task is multiple. It is necessary to organize real crusades of studious persons of good will of all kinds who, moving from one nation to another, from one America to the other, may go about demonstrating

² Dr. Silgueira was elected President of the Inter-American Bar Association at the close of the Habana Conference, and Buenos Aires was chosen as the place for the meeting in 1942. Owing to war conditions and lack of transportation facilities, the conference was not held. As Dr. Silgueira, for reasons of health, could not attend the Washington meeting, his address was read by Señor Don Adolfo Scilingo, First Secretary of the Argentine Embassy.—W. R. V.

through lectures and through other conducive means the objective aspect of each country's activities—political, economic, scientific, literary, artistic, industrial, scholastic, and juridical-social, in order that they may be compared, analyzed, and made well-known to all.

This dissemination of information directed by the Association, in harmony with other organizations, will bring to success the designs which created it, nourishing at the same time in union with other moral, material, and spiritual forces the flourishing American culture.

Dr. Silgueira summed up the purposes of the Association as "to elevate and honor the practice of the law, to give impulse to the progress of legislation; and to assure the supremacy of the law." He closed his address with this significant declaration:

But I should contradict myself, I should hide my own feelings and desires were I not at the same time to formulate along with you a wish that comes from the depth of my soul, as a man of law, as a believer in continental fraternity, as an Argentine, that is, a wish for the good fortune for the cause of America, which is the cause of justice, of civilization, and of humanity.

Another address of particular significance was that delivered by Dr. J. Blanco Uztariz, member of the Council and representative of the *Colegio de Abogados del Distrito Federal*, Caracas, Venezuela, at the joint luncheon of the Inter-American Bar Association and the Federal Bar Association. Dr. Blanco Uztariz is a member of the *Academia de Ciencias Políticas* and of the *Comisión Nacional Codificadora de Derecho Internacional*, and has been a deep student of international relations. He expressed apprehension at the "unleashing of brute force against everything noble and fine that makes for the dignity of man." He referred to the tribunals set up through treaties as a result of exhaustive labors by scholars which unfortunately have been dealt a severe blow by certain peoples who "in spite of so many centuries of education and culture, are still influenced . . . by their own national sentiments which lead them to confuse justice with their individual interests and aspirations." He expressed the opinion that "in the international sphere, there is evidence of the existence of a state of affairs such as would result within the national borders of any country, among people of the same race, if suddenly there would cease to exist the effective means whereby the State enforces the observance of law and order, essential to the maintenance of its political and civil stability." He expressed the belief that an international police force should be established "for the maintenance of international order in the hands of those nations that will shape the world of tomorrow." After reviewing the efforts to create institutions for the maintenance of collective security, and after setting forth the views expressed by Gonsorioski, Ezequiel Padilla, Foreign Minister of Mexico, and Edward Beneš, he suggested that the Inter-American Bar Association "promote the careful study of this problem, thereby making a technical contribution which before long is likely to become a matter of real urgency."

The Honorary President of the Association, Dr. Manuel Fernández Supervielle, who is also Dean of the *Colegio de Abogados de la Habana*, gave much sound advice regarding the further expansion of the organization. In addition to presiding at the opening session, he delivered an address at the final meeting in which he discussed some of the principles which he believed should be emphasized in the post-war legal framework of institutions developed to prevent a recurrence of war. He stressed the importance of the principle of private ownership of property and the freedom of individual initiative that had brought about the development of free institutions in this hemisphere. He quoted with approval the statement in the address of the Hon. Sumner Welles of May 30, 1942, at the Arlington National Cemetery, that the best system to follow is to give more incentives and opportunities to individual enterprise. He also expressed the opinion that "A court of international justice and a restraining power that will assure the performance of its resolutions and maintain peace among the nations" is necessary, and quoted the statement of Secretary of State, Hon. Cordell Hull, of July 23, 1942, that "one of the institutions that should be established and which must be given efficacy is an international court of justice," and that "there must be created, by force if necessary, some organization of an international character for the maintenance of peace among the nations." The responsibility of the Inter-American Bar Association, Dr. Supervielle concluded, was to help "win the peace by the effort of our thought and the honesty of our convictions" in order that adequate formulas might be discovered "for assuring to all men of the world a more tranquil and more Christian life, free from hatred, from miseries, from dangers and from fear."

The address of Mr. George Maurice Morris was particularly significant on account of the position he holds as President and spokesman for the American Bar Association. He stressed the interdependence of nations on account of the shrinkage in the size of the world due to greatly improved means of transportation and communication. He pointed out that "wars are no longer fought by armies and navies alone: they are fought by entire nations," and referred to the importance of friendship among peoples as distinguished from the merely formal friendly relations of their governments. He quoted Dr. Raoul Herrera-Arango, Cuban diplomat and scholar, as having stated that "our economic differences are adequate proof of our interdependence," and stressed the importance of the lawyer in working out advantageous interchanges between the peoples of our new hemisphere in efforts to improve their lives. The common fundamental impulse of those who came to this hemisphere to improve their living conditions and their freedom from foreign oppression has united our nations in a pledge "to come to one another's aid when any of us is threatened with foreign domination." The deep interest of all lawyers in this hemisphere in promoting the administration of justice and in advancing the science of jurisprudence not only in the domestic law of our own countries but also in the international relations of our governments

and of our citizens with each other was shown to be one of the principal forces motivating our united action in the present conflict. Mr. Morris stated that there is nothing more fundamental to any lawyer's life than justice under law. He said:

It is time for the organized bar to begin moving to the attack on post-war legal problems so far as these may now be anticipated.

* * * * *

We should lose no time in taking up our task. This Association is an excellent instrument for the focusing of the ideas and influence of the lawyers of the Americas. We should not adjourn our session without setting up a machinery dedicated to achieving that focus. The world is woefully wanting in wisdom. If among us there is any store of that priceless ingredient for successful living, we should be the last to hoard it.

The joint luncheon with the Federal Bar Association was attended by over 250 guests. Addresses were delivered by Hon. Robert N. Anderson, who presided; Hon. Francis J. Biddle, the Attorney General of the United States; Hon. Leon Mercier Gouin, Canadian Senator from Montreal; Hon. Hatton W. Sumners, Chairman of the Judiciary Committee of the United States House of Representatives; and Dr. J. Blanco Uztariz, of Venezuela. Attorney General Biddle emphasized the value of the exchange of ideas among lawyers of this hemisphere, particularly in view of the immediate problems that confront us. He suggested consideration of measures for strengthening the unity between the countries of Canada, the United States and the great Latin American Republics, and said that "unity between these great nations is not in any sense uniformity. It means the kind of sympathy, through the exchange of views at meetings of this kind, that we can give to the problems we all have in common," and upon which we will have to have a prepared and intelligent public opinion when they are ultimately put to the public for its decision, which may come suddenly, just as the peace may come suddenly.

Senator Mercier Gouin, of Quebec, made a stirring address on the need for strengthening the links which bind together the nations of the Americas and said:

In union there is strength. We have found at last in our inter-American friendship a source of unconquerable strength. We have found imperishable ties which will unite us forever for the common welfare of all humanity, of a humanity freed again by the victory of right against tyranny, by the triumph of our cause, the sacred cause of freedom and justice.

Judge Hatton W. Sumners referred to the service which lawyers can render to the world in this, the greatest crisis of all the ages, and emphasized the success of the men of science in obtaining knowledge of the great natural laws that govern in their respective fields of action. He regretted the failure to discover the great fundamental laws that make possible the preservation

of liberty and peace upon the earth. He made the following significant declaration:

The people of the United States in this hour want no conquest. . . . We of the United States pledge to our sister republics of the Americas every resource of the United States and every drop of blood to preserve the independent sovereignty of every country in the Americas.

That day is coming when we have got to devise some better means than war and force to settle disputes among nations. . . . I think as we approach the establishment of a better method than war to settle disputes among nations, as we attempt to put government into that area that lies between the governments of the world, the breeding ground of world wars, that there must be zones of primary responsibility. I would like to see the nations of the Americas assume primary responsibility for preserving the peace of America. Then I would like to see those nations stand together, when they sit around the council table of the world, and undertake to preserve peace among the other great groupings of the nations of the world.

The Hon. D. L. McCarthy, K.C., of Toronto, former President of the Canadian Bar Association, presided at the session of the Council on November 20. He gave assurance that the Canadians were "pledged body and soul with you to our last men and to our last dollar, and to share with you the sacrifices, the perils and the glory of the inevitable victory which must be ours at the end of this abysmal war." He referred to the fact that the boundary line between the United States and Canada had been "unguarded by a fort or battleship for more than 100 years," and that "we inherit the same traditions and live under the same protection of constitutions strongly alike." He expressed regret at the impossibility of holding the meeting at Buenos Aires this year, and hoped that the lawyers "in Canada shall establish the same relations with our brethren in South America that exist between us and the brethren in North America today."

Following the address of Mr. Frederic R. Coudert, President of the American Society of International Law, which is printed *infra*, p. 115, Col. William S. Culbertson, former Ambassador to Chile, spoke on the subject of "Law is Power." He contrasted law as developed in the totalitarian States and the democratic process by which law is responsive to the will of the people through their chosen representatives. He said:

We have in this country, and in the countries of this hemisphere, the other type of legal or constitutional State, the one that recognizes the people as the source of law and the law which controls the action of the State. . . . There is a body of principle, a body of concepts which are true, whether in Washington or Chungking, which are true today and which were true a thousand years ago. I am one of those who believe that two and two make four in Washington and that they also make four in Chungking. I am one of those who believe that a straight line is the shortest distance between two points today, and it was the same in the days of Socrates and in the days of George Washington. The same way with law; there are certain broad fundamental concepts which must

lie at the basis of an executive State or a democratic State, principles which are associated with an enlightened society wherever it is, and which control and determine the relations of human beings. In this legal State of which I speak, this constitutional State, law, therefore, is power. In an international order which assures security, justice and prosperity, law is also power. . . . I believe that there are standards of justice which remain the same in all ages and under all conditions. They underlie all systems of law, whether Roman, Anglo-Saxon, Chinese, Mohammedan, Russian or Indian. They are inseparably associated and linked with an enlightened society, whether it be national or international.

An address by Sir Zafrulla Kahn, a Justice of the High Court of India and Chairman of the Indian delegation to the Pacific Relations Conference in Montreal, gave the Council an opportunity to be enlightened by this distinguished jurist regarding the judicial system in force in India and the existing relationship between Great Britain and India.

The dinner given in honor of the delegates was an event of unusual significance in view of the diversity of the nations represented by those who participated in the program. Dr. Edmundo de Miranda Jordão, President of the Brazilian Bar Association, was the presiding officer and introduced Dr. Ricardo J. Alfaro, who served as toastmaster. The outstanding ability of this distinguished lawyer and diplomat was never exhibited to better advantage than in introducing the speakers of the evening.

Dr. Celso R. Velásquez, Professor of Civil and Commercial Law, former President of the National University of Asunción, and now Ambassador of Paraguay to the United States, brought an enthusiastic message of good will from the *Colegio de Abogados del Paraguay*. Lic. Alfonso Noriega, Vice President of the National University of Mexico, who occupies the chair of Constitutional Law in that institution, spoke in Spanish and thrilled his audience with his strong appeal for inter-American solidarity and brotherhood in arms against the efforts of the totalitarian States to destroy the democratic way of life. Hon. Robert H. Jackson, Associate Justice of the Supreme Court of the United States, then delivered an able address concerning the principles of the common law and those of the civil law as observed in the nations of this hemisphere, particularly as a result of their common basis of government by means of written constitutions.³ The Hon. Louis St. Laurent, Minister of Justice of Canada, discussed the steps by which Canada had acquired its present position of independence and concluded his remarks with the following significant statement:

Canada is a nation. She solves her own domestic problems; she deals directly with other nations. She has received the ministers sent by many other nations to her government, and has accredited her own ministers to the capitals of those nations.

³ Justice Jackson's address will be printed separately in the next issue of the JOURNAL.
—ED.

Canada has become conscious of her responsibilities as an autonomous member of the British Commonwealth of Nations, as well as a fullgrown member of the greater society of all democratic nations.

At the final session on November 21, Mr. George Maurice Morris presided and introduced Dr. Dantès Bellegarde, of Haiti, who, speaking in French, pointed out that his country had declared war on Germany, Italy and Japan before the United States did, following news of the dastardly attack on this country on December 7, 1941, at Pearl Harbor. He assured his audience that Haiti had entered the war in support of the universal cause of liberty, fraternity and justice, that "the important question is one of two conflicting ideologies, both of which cannot possibly exist because one is in conflict with the other, and the one cannot exist because it consists of the domination by one race of another." He referred to the declaration of the rights of man adopted by the Institute of International Law, and to the Atlantic Charter, and asserted that "we have thought too long that morality was sufficient to obtain the result" of maintaining peace and that now "We need also policemen and a force behind the action which will apply sanctions."

The Council then received reports from the chairmen of the following standing committees:

- Commission on Inter-American Academy of International and Comparative Law.
- Committee on Immigration, Naturalization Laws and Citizenship.
- Committee on Industrial Property (Patents and Trade-Marks).
- Committee on the Law of Trusts and Trustees.
- Committee on Unification or Coördination of Legislation Relative to the Civil Status of Persons.
- Committee on Taxation.
- Committee on Administrative Law and Procedure.
- Committee on Customs Legislation.
- Committee on Commercial Treaties.
- Committee on the Protection of Intellectual Property (Copyrights).
- Committee on National Centers of Legal Documentation and National Bibliographical Indices of Law Materials.
- Committee on Legal Education.

The following additional committees were also created:

- Committee on Comparative Constitutional Law.
- Committee on Comparison of Civil and Commercial Laws.
- Committee on Communications, including Air Law, Telecommunications, Maritime and Highway Transportation.
- Committee on Industrial, Economic and Social Legislation.
- Committee on Penal Law and Procedure.
- Committee on the Study of Ocean Fisheries.

One of the most significant resolutions adopted was based on a proposal by Dr. Natalio Chediak, of Habana. In its final form it provides as follows:

Resolution Concerning Post-War Problems

(Action of Executive Committee upon reference of the matter to it by the Council)

The Inter-American Bar Association creates a Committee on Post-War Problems to have its seat in Washington, to be named by the Executive Committee. Its functions shall be:

1. To receive from each of the member associations of the Inter-American Bar Association such suggestions respecting international juridical problems affecting the post-war situation as they may wish to submit.

2. To correlate and disseminate through the Inter-American Bar Association member associations the suggestions so submitted.

3. To submit through the Executive Committee to the Council of the Inter-American Bar Association recommendations for such actions as may be considered suitable.

The Council also adopted the following resolutions:

Resolution Concerning the Inter-American Academy of International and Comparative Law

Resolved, That the progress Report of the Commission for the Creation of an Inter-American Academy of Comparative and International Law be received and approved, with special commendation for the splendid work of the Commission under the Chairmanship of Dr. Ernesto Dihigo, it being understood that the Commission shall continue to function with the full powers given to it under Resolution XX of the Habana Conference.

Resolutions Concerning Protection of Intellectual Property (Copyright)

(1) To authorize the Committee on Protection of Intellectual Property to conduct the comparative study of the legislation of our continent on copyright, including not only the legal texts but also the judicial decisions and administrative procedure, in close coöperation with such institutions as the *Instituto Argentino de Derecho Intelectual* and with such others as we hope will be established as a result of the personal efforts of Dr. Stephen P. Ladas and Dr. Alberto Blanco.

(2) To coördinate the activities of our Committee with experts, jurists, and specialists in these studies, who are members of the organizations affiliated with the Inter-American Bar Association.

(3) In order to give full effect to the objectives of coöperation which brought about the establishment of the American Academy on Copyright and the Inter-American Federation of Societies of Authors and Composers, the Committee could consider the appropriate measures to aid these institutions, which are considered highly valuable for the improvement of inter-American copyright protection.

Resolutions Concerning Tax Problems

WHEREAS, the plenary meeting of the First Conference of the Inter-American Bar Association, held at Habana, Cuba, March 24-28, 1941, voted the following resolution:

"WHEREAS, Taxes may unnecessarily obstruct inter-American trade if they do not conform to sound principles of jurisdiction, the First Conference of the Inter-American Bar Association resolves that the members of the Association recommend to their respective governments the conclusion of treaties to prevent discriminatory extraterritorial and double taxation."

"WHEREAS, on March 4, 1942, there was concluded between Canada and the United States of America a convention removing tax barriers to the flow of investments and trade between the signatory States, thus affording a splendid and encouraging example of the manner in which the objectives of said resolution may be realized;

Be it resolved, That the members of this Association bring the said convention to the attention of their respective governments and urge the undertaking of negotiation of conventions for similar purposes between their own and other governments of the Western Hemisphere in

order to promote reciprocity in their taxing policies and a resulting increase in commercial intercourse and prosperity.

Be it further resolved, That all persons or groups of persons affected by or troubled with international tax problems which involve the countries of the Western Hemisphere and bear with unusual severity upon taxpayers, thereby tending to obstruct the ready flow of commerce and capital, be invited to bring such problems to the attention of this Association's Committee on Taxation for study with a view to determining the possibility of remedy by legislation or convention.

Be it further resolved, That copies of this resolution be sent to all associations and organizations which are members of the Inter-American Bar Association for the purpose of having it given publication by them for the benefit of their own members, members of coöperating associations and organizations, and the public.

Col. William Cattron Rigby then presented the Report of the Executive Committee, of which he is Chairman. Rio de Janeiro was chosen as the place of the Second Conference of the Association, to be held the week beginning August 7, 1943, the date of the 100th Anniversary of the founding of the Brazilian Bar Association. Announcement was made of the acceptance of the resignation of Dr. J. Honório Silgueira as President, with expressions of regret and appreciation of his valued services; and of the election of Dr. Edmundo de Miranda Jordão as President of the Inter-American Bar Association. Announcement was also made of the acceptance of the resignation of Dr. Walter Villegas, of Buenos Aires, as Assistant Secretary General and of the election of Dr. Oswaldo Trigueiro, of Brazil, as Assistant Secretary General to fill the vacancy.

Dr. Miranda Jordão then delivered the concluding address of the session, in which he expressed appreciation of the coöperation shown by Dr. Silgueira and Dr. Villegas, as well as by the representatives of Mexico, who had desired to have the next conference held there, in making it possible for the Brazilian Bar Association to have the meeting in its capital on the 100th Anniversary of the founding of their Association. He reviewed the part that Brazilian lawyers have taken in the codification of law in this hemisphere.

The enthusiasm of those who attended the sessions gives promise of accomplishments of great significance by this young organization. The need for closer future collaboration among the lawyers of this hemisphere as a result of the shrinkage of the world, with the improvements in aviation and communication, gives an unusual opportunity for service to those in positions of responsibility who are participating in the work of this Association.

ADDRESS BY FREDERIC R. COUDERT

President, American Society of International Law

[At the Meeting of the Council of the Inter-American Bar Association,
Washington, D. C., Nov. 20, 1942.]

The formation of this Association representing the lawyers of the Western Hemisphere is, I am convinced, a notable event; an event which would per-

haps have been impossible had it not been for the global war threatening the destruction of the foundations upon which law and justice have been erected through the ages. The rôle of the lawyer in the rise of civilization can scarcely be exaggerated. It is of cardinal importance that that influence should be concentrated, intensified and directed so that the world to come may be saved from a recurrence of anarchy brought about by militaristic ambitions to rule by force against right and justice.

That eminent statesman and philosopher, General Smuts, recently said that if, as he hoped, this World War should successfully end in 1943, the world would then have terminated the second thirty years' war. As one looks back over the past thirty years, we can realize the truth of this observation.

The profound shock to the public law of the world which began with the German aggression in 1914 and which resulted in world chaos, was the origin of a long process of disintegration. I believe that that process is near its termination and that the healing process of salvage and integration is about to recommence.

The totalitarian system means nothing more or less than military domination, and hence permanent war by certain nations who desire to subjugate, degrade and enslave others. That policy is based upon the biologic view of human nature, and omits all of the ethical factors which serve to distinguish man from the animal. It is a reversion to that primitive tribalism in which tribe destroyed tribe, and where war was the natural and permanent pursuit of man. This view, which underlies the plans of Germany and Japan for world conquest, is as false as it is vicious. A great thinker and man of science, who wielded wide influence at the end of the nineteenth century, Thomas H. Huxley, admirably expressed the truth as follows:

Social progress means a checking of the cosmic process at every step and the substitution for it of another which may be called the ethical process; the end of which is not the survival of those who may happen to be the fittest, in respect of the whole of the conditions which obtain, but of those who are ethically the best. . . . The intelligence which has converted the brother of the wolf into the faithful guardian of the flock ought to be able to do something toward curbing the instincts of savagery in civilized man. (*Evolution and Ethics*, page 81.)

International law governing the relations between independent nations is an instrument. Back of that law there has been, at least to some extent, and must be in the future to a far greater extent, a community of nations. Peace among men can only be maintained by one of two methods: we will have either that imperialism which results from force—a Roman peace which means the subjugation of the weaker nations by the stronger, where law becomes imperial fiat—or we may have a law which has the consent of the nations united in a community in which the interests of all transcend that of any one. Such a situation represents a higher form of civilization; a situa-

tion in which reason and justice are the dominant factors. The lawyer class represents the reverse of force, the policy of reason and justice. Whether we base the hopes of men upon natural law, the inherent rights of man, or upon that "due process of law" which requires notice and hearing before there can be condemnation, the result is much the same.

While the great military structure of the Roman Empire perished, the great body of civil law survived. That civil law coming down from the ages prevails as a basic system in the southern part of our continent. It can admirably supplement our own common law made up of diverse elements, but also based upon an appeal to reason. The lawyer, whether civil or common law lawyer, equally possesses that heritage of ideas which found society upon reason rather than upon force.

I am convinced that despite the dark outlook which thirty years of war, revolution and continued unrest have cast upon the world, there are certain factors which may enable us to hope for a better future. We have as an important element that understanding which exists between the English-speaking people who have for nearly a century and a half found that their conflicts of interest may be solved by the methods of the diplomat and lawyer, and that these conflicts are susceptible of admission to judicial determination. The other factor of cardinal importance is the Pan American idea and organization. The nations of this continent, imbued with a desire for independence from imperial domination, threw off all alien yoke. Today they stand solidly arrayed against any attempt to fasten a foreign or an alien system upon any of them. More than that, affirmatively they stand together to maintain peace and law throughout this Western World.

I am convinced that the Western Hemisphere will follow the policy long ago inaugurated by its leaders and will settle its differences by an appeal to reason and the methods of the lawyer rather than that of the conqueror and imperialist. It is because this movement has already so far advanced that it is particularly important to bring together those priests of justice and fair dealing—the jurists and the lawyers. We can by common effort materially aid in maintaining a great continent on the road to progress through peace and its handmaid, law.

By striving for a uniformity based upon the selection of the best elements in each system of law, economic intercourse throughout the continent will be widely served. By respecting the rights of man and the rights of nations, international law will be placed upon the most solid foundation, and from Canada to the Argentine a real community of free nations consenting to be ruled by law will exist.

INTERNATIONAL LAW'S GREATEST NEED

✓ Without sanctions, laws represent only what Alexander Hamilton called "government by supplication," which has never proved effective, and never can. And international law is no exception: for it, too, sanctions are essen-

tial to success. But there is something prior to sanctions, and that is a body of leaders that can safely be trusted with the power necessary to enforce sanctions. If your laws are international, and the powers necessary to their enforcement are entrusted to nationalistic minds, it is inevitable, as history clearly proves, that the power will be employed to further the special interests of the nation, or nations, to whose nationals the duty of enforcement is entrusted.) For example, Athens, the intellectual and moral leader of the Greeks, once persuaded the other Greek city-states to form a league for mutual protection, and to construct, at joint cost, a fleet to save Greek liberties. To Athens was entrusted the command of that fleet: but the Athenians had been trained to nationalistic thinking, or thinking only in terms of the special interests of their own city-state, and they promptly employed the fleet to destroy the liberties of the contributing states of the league, and to give Athens supremacy over them.

Since then, and down to and including the experiment of the League of Nations, whenever the power to operate sanctions for international law has been given to nationalistic minds, the good results have been very near to what mathematicians call "absolute zero." In every case, the controlling nationalistic minds have done, or sought to do, just what Athens did; and they have looked upon their treachery as the noblest kind of patriotism. In every case, the treachery was due, not to any special wickedness of the offending State, but to the fact that her nationals had been trained to believe that loyalty to their nation was the highest possible type of loyalty. Until we can discover, or create, minds which think habitually in terms larger than any one nation, race, or creed, we cannot reasonably hope to have international law, with sanctions, enforced in the interest of the nations, and not merely of the nation controlling the power back of the sanctions. This was clearly the thought in the mind of Elihu Root when he said, soon after the League of Nations was formed: "The indispensable prerequisite of lasting peace is the creation of the international mind." That League failed to maintain lasting peace, chiefly because it could not put sanctions back of laws meant to be international, and the cause of the failure was millions of nationalistic minds.)

We are again discussing plans for a new international world order, and the prerequisite of success is still the ability to produce minds which habitually think and plan in terms as large as the area to be covered by international law, that is, the family of nations. If we can create minds which think in world terms, we can employ sanctions which run throughout the world. But, upon any other conceivable terms, we cannot operate them with success.

What then is the need behind international law? Clearly, to create, by education, which is a slow process, or by propaganda, which is a fast process, minds trained to think of every question in the largest possible terms, that is, in planetary terms. By an evolution, which has taken centuries, we have passed from the mind of the cave man, who thought only in terms of his cave,

to the clan mind, which thought only in terms of the clan; then to the national mind, which thinks only in terms of the nation. There the process of evolution has "bogged down." We must dig it out, and promptly, that progress may go on, until we have the international mind, the mind which can be trusted to operate the sanctions for our international laws; trusted to use the power back of sanctions, not for any nation or special group of nations, but in the interest of all nations)

Has this war really started us in that direction? Certain facts appear to indicate that it has; but others raise questions. For example, there is today, in the United States of America, a determined effort to make American history a compulsory study in all American schools, colleges and universities. The first question to be answered, in determining the tendency of that movement, is this: "Would the compulsory study of American history, as at present written, help or hinder the creation of the international mind?" For the answer, one need only read the preamble to the Constitution of the United States, which declares this purpose: "to secure the blessings of liberty *to ourselves and our posterity*." As presented today, in American text-books available for use in such instruction, American history is chiefly an elaboration of that purpose. The tendency of all of them is to lead maturing minds, the minds which must soon lead America, and should help the world toward a new world unity, to think in terms of America only, or, at least, "America first."

If the American Constitution, and the history which records its origins, its successes and its failures, could be so rewritten as to lead men toward a wider loyalty, a world-loyalty, they might serve effectively to teach men the necessity of international thinking, and constitute a worthy study, not for Americans alone, but for all mankind. And the same may be said of the history of every nation. What we call history is too often the record of the past of a single nation, so written as to interest and instruct people of only one nation. This is not history. It is propaganda, in the evil sense of that once noble word; and it should have no place, either as a compulsory or as an elective study, in any school, college or university. History should present, indeed must present, lessons of past experience which are "fit to be made universal." If it fails in this, it is not history, but pernicious localism. What is needed is more emphasis upon what Frederick Harrison called the "Connections of History"; less emphasis upon what Dunning once indignantly called "histories of the town pump." The proper study for all mankind is all mankind; and any study calculated to increase localism is of evil tendency, whether "required" or "elective."

[The great enemy of progress is not Hitler, dark and menacing as he is at this moment. It is not Fascism, Nazism, Bolshevism, or the self-worship of Japan. The real enemy of progress is the provincial mind, the mind that plans for ends purely local in character and dreams of racial or national supremacy. We have long cherished a phrase, "Competition is the life of

trade." Those who have studied the progress of the industrial era, however, know that, not competition, but coöperation is the life of trade. Competition is the life of war; and competition in armaments is a symptom, not a solution. We must cure the disease; and the disease is the provincial mind. As long as it is dominant in the world, and today it is dominant, there can be no international law, with sanctions, in effective operation.)

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THE FIRST INTER-AMERICAN CONFERENCE ON SOCIAL SECURITY

The First Inter-American Conference on Social Security was held at Santiago de Chile, September 10-16, 1942, on the invitation of the Chilean Government and under the auspices of the Inter-American Committee to Promote Social Security established on December 12, 1940, at a meeting of social security administrators and diplomatic representatives held in Lima at the joint invitation of the President of Peru and the then Director of the International Labor Office, the Hon. John G. Winant.¹ The Santiago de Chile Conference was attended by delegates from twenty-one American countries, including Canada, by a tripartite delegation of the Governing Body of the International Labor Office, and by delegations from the Pan American Sanitary Bureau and the International American Institute for the Protection of Childhood.

The opening session of the Conference was attended by the President of Chile and addressed by the Chilean Secretary of State. The Conference elected as President the Chilean Minister of Health, Dr. Miguel Etchebarne Riol.

The Chairman of the United States delegation was Mr. Arthur J. Altmeyer, Chairman of the Social Security Board. Mr. Nelson A. Rockefeller, Coördinator of Inter-American Affairs, also attended the Conference. The other delegates included the Mexican Secretary of Labor, senior officers of the social insurance funds of Argentina, Bolivia, Brazil, Costa Rica, Cuba, Chile, Panama, Peru and Uruguay, and diplomatic representatives of other American countries. The Governing Body of the International Labor Office was represented by Mr. Paul van Zeeland, former Prime Minister of Belgium, representing the Government group, Mr. Clarence McDavitt, representing the employers' group, and Mr. Robert J. Watt, representing the workers' group. The Secretary General of the Conference was Mr. Osvald Stein, Assistant Director of the International Labor Office.

The Conference adopted the Declaration of Santiago de Chile, which affirms the continental solidarity of the Americas in the pursuit of social se-

¹ For the text of the resolutions establishing the Inter-American Committee to Promote Social Security, see *International Labor Review*, Vol. XLIII, No. 1, Jan. 1941, pp. 105-107.

curity, fourteen technical resolutions regarding social insurance questions, and the Statute of the Inter-American Conference on Social Security, a newly created agency which is to act in concert with the International Labor Office.

The Declaration of Santiago de Chile was submitted by the Argentinian, Chilean, Mexican and Peruvian delegations and adopted unanimously. The preamble to the Declaration recites that "freedom and dignity are essential and inalienable attributes of human personality," that "to be able to enjoy fully the basic freedoms of thought, expression and activity, every man and woman must be afforded physical and economic protection against social and economic risks through properly organized social action" and that "it is the common desire of the American nations to increase constantly the moral and material welfare of individuals and families." The Declaration then enunciates the following principles of social and economic security:—

1. Society must find a new inspiration in a movement of solidarity of all men and nations to abolish poverty and secure the means of living in health and decency.

2. The potentialities of economic and technical resources must be turned to account in order to satisfy the necessities of life of the greatest number of persons and peoples.

3. The economic objective will not suffice to evoke a hearty and generous coöperation unless identified with the moral objective of a just social order, which equitably distributes the fruits of production.

4. Each country must create, conserve and build up the intellectual, moral and physical vigor of its active generation, prepare the way for its future generations, and support the generation that has been discharged from productive life. This is social security: a genuine and rational economy of human resources and values.

5. The provision of such basic security will promote personal effort and initiative and improve the structure of society by the elimination of the causes of social insecurity.

It defines the functions of social insurance, as an expression of social security, as being:

6. (a) to organize the prevention of risks the occurrence of which deprives the worker of his earning capacity and means of subsistence;

- (b) to restore, as quickly and fully as possible, the earning capacity lost or reduced by reason of sickness or accident;

- (c) to supply the means of subsistence in case of cessation or interruption of gainful activity as the result of sickness or accident, temporary or permanent invalidity, unemployment, old age, and premature death of the breadwinner.

There follows an important declaration of policy regarding a continental program of social security which comprises four points:

7. A policy of social security for the Americas should comprise measures for promoting employment and maintaining it at a high level, for increasing the national income and sharing it more equitably, and for

improving health, nutrition, clothing, housing and general and vocational education for workers and their families.

8. The health, capacity and welfare of the workers of any one American nation is a concern of all American nations, and therefore concerted action by social security institutions is imperative for the preservation of their human assets as a guarantee of continental defense and integrity.

9. This action implies for the American nations the necessity of establishing a common reservoir of all things required for maintaining the continuity of their social policy, for preserving their unity, and for meeting any eventuality in this connection.

10. A continental agreement entered into by the social security institutions will forge new links of solidarity by solving problems in which the fate and conscience of all peoples are deeply engaged, and will strengthen the belief in the future of the Americas.

The final paragraph of the Declaration affirms that "the decisions of the Americas with a view to a new structure of social security represent a contribution to world solidarity in seeking the well-being of peoples and the attainment and maintenance of peace."

The general conceptions embodied in the Declaration of Santiago de Chile will no doubt exercise a substantial influence upon the future development of the law of nations, but the provision which is of most immediate interest to international lawyers is the affirmation that "the health, capacity and welfare of the workers of any one American nation is a concern of all American nations." One is reminded of the phraseology of the Covenant of the League of Nations which declares that "any war or threat of war, whether immediately affecting any of the members of the League or not" is "a matter of concern to the whole League." This type of concept, if acted upon, may have revolutionary implications for the future of international law. It involves the substitution of the interdependence for the independence of States as the keynote of the international legal system. The concept of the "reserved domain"² may continue to be of importance in the international law of the post-war world, but, as the Permanent Court of International Justice has said, "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question" depending "on the development of international relations."³ Hitherto the health, capacity and welfare of workers have been regarded as matters of domestic concern except in so far as they are regulated by the international obligations assumed under the Constitution of the International Labor Organization, the conventions embodied in the International Labor Code, and other instruments. The preamble to the Constitution of the International Labor Organization declares that "the failure of any nation to adopt humane conditions of labor

² Regarding which see N. Politis, "*Le problème des limitations de la souveraineté*," in *Recueil des Cours de l'Académie de droit international*, Vol. 6, especially at pp. 43-76.

³ *Tunis and Morocco Nationality Decrees Case*, Advisory Opinion No. 4, P.C.I.J., Series B, No. 4, p. 24.

is an obstacle in the way of other nations which desire to improve the conditions in their own countries" and thus anticipates the doctrine that labor questions are a matter of common concern which States are no longer entitled to regard as being by international law exclusively within their domestic jurisdiction except in so far as regulated by express international obligations, but it does not explicitly formulate any such doctrine. The Declaration of Santiago de Chile, which is largely the handiwork of social security administrators from the Latin American countries, gives specific expression to the doctrine that the health and well-being of the people are, as between the American nations, a matter of common international concern. This doctrine would appear to carry the implication that respect for national sovereignty is no longer to be regarded as requiring States to disinterest themselves from internal social conditions in other States which have a bearing upon the security and prosperity of the community of States as a whole. General recognition of the principle would prepare the way for far-reaching developments which would give the law of nations a real economic and social content. This is of special significance in the light of the provisions of the mutual aid agreements concluded by the United States with a number of the other United Nations contemplating agreed action directed to the expansion, by appropriate international and domestic measures, of production, employment and the exchange and consumption of goods. It would be unwise to attempt to predict in any detail the probable impact upon the law of nations of the emergence of these new social objectives of international economic policy, but it is reasonable to surmise that that impact will be so far-reaching as to transform the law as we have known it hitherto almost beyond recognition. The doctrine of "common concern" has also a more immediate significance in that it should facilitate the conclusion of arrangements regarding social measures having a bearing upon the acceleration of increased production of strategic war materials in Latin America.

The technical resolutions adopted deal with the generalization of social insurance, the scope and object of social insurance, the extension of social insurance to agricultural workers, domestic servants and the self-employed, the extension of social insurance to intellectual workers, social insurance against industrial accidents and occupational diseases, the efficacy and economy of medical and pharmaceutical benefits in health insurance plans, disability insurance, the participation of employers and workers in the administration of social security, the maintenance of insurance rights of mobilized persons, the functional coördination of organs of social policies, the financial organization of social insurance, the unification of biostatistical information, the protection of maternity, childhood and adolescence, and the coördination of social assistance with social insurance. These resolutions supplement the Inter-American Social Insurance Code consisting of the resolutions concerning social insurance adopted at the First and Second Labor Conferences of American States (Santiago de Chile, 1936, and Habana,

1939).⁴ The Inter-American Social Insurance Code is a code of standards of policy and legislation and therefore has no binding character, but its provisions have exercised a far-reaching influence upon the development of national legislation and the majority of them are based upon Book VI (Social Insurance) of the International Labor Code which embodies the requirements of fifteen international labor conventions which constitute international obligations binding upon varying numbers of countries.⁵

The Statute of the Inter-American Conference on Social Security was annexed to a resolution whereby the Conference decided "to establish, with the title of Inter-American Conference on Social Security, a permanent agency of coöperation, which will act in concert with the International Labor Office" and be governed by the terms of the Statute. The Statute states that "The Inter-American Conference on Social Security, inspired by the principles concerning social security approved by the tripartite Labor Conferences of the American countries which are members of the International Labor Organization, is intended to facilitate and develop the coöperation of the social security administrations and institutions" (Article 1). Membership of the Conference is open to the representatives of the central administrations and ministerial departments interested in the purposes of the Conference, of social security and social insurance institutions and funds, and of central advisory and technical councils concerned with social security and social insurance, and it is specially provided that "efforts should be made to include representatives of employers and workers in the delegations" (Article 2).

There is to be a Permanent Inter-American Committee on Social Security with the functions of: "(a) giving effect to the resolutions and recommendations adopted by the Conference; (b) preparing the sessions of the Conference and fixing the agenda of the sessions; (c) contributing by every other means to the attainment of the purposes of the Conference" (Article 3). The Permanent Committee is to consist of one regular member and at least one substitute member from each country represented in the Conference, appointed by the Government (Article 4). A tripartite delegation appointed by the Governing Body of the International Labor Office, the Director of the International Labor Office, the Director General of the Pan American Union, and the Director of the Pan American Sanitary Bureau may join the Committee at their own request (Article 5). The Permanent Committee is to draw up its standing orders and determine its own procedure, and may appoint an Executive Body to act for it during the intervals between sessions (Article 7). At the request of the Committee and in consultation with it, the Director of the International Labor Office may appoint one of his assistants who is competent for social security questions to act as Secretary General of

⁴ For the text of the Inter-American Social Insurance Code, see *The International Labor Code*, 1939, pp. 826-842.

⁵ *The International Labor Code*, 1939, pp. 289-370.

the Committee (Article 9). The Conference and the Committee are to be kept informed by the Director of the International Labor Office, by means of periodical reports, on international developments (Article 10), and the Director of the International Labor Office is to inform the Governing Body of the Office, from time to time, on the work of the Conference and the Committee (Article 11). The expenses resulting from the decisions of the Conference and the Committee may be financed by the subscriptions of the administrations and institutions which are members of the Conference, as may be determined by the representatives in the Permanent Committee of the countries represented in the Conference. The Committee may authorize the Secretary General, or a Treasurer whom it may appoint, to collect the subscriptions and administer the finances (Article 12). The adoption of the Statute by the First Inter-American Conference on Social Security does not engage the administrations and institutions participating which, in conformity with the law or their rules, require to obtain special approval, and the provisions of the article which concern the Governing Body of the International Labor Office are not to have effect until the Governing Body has approved them (transitional provision).

The delegations of thirteen countries (Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Panama, Paraguay, Peru, United States, Uruguay) agreed to establish the Permanent Committee at once without further authorization by national authorities, and a meeting of the Committee was held at the close of the Conference. The Permanent Committee immediately appointed to the Executive Body provided for in the Statute the representatives of the United States of America, Argentina, Brazil, Chile, Mexico and Peru, and the Executive Body elected as its chairman Mr. A. J. Altmeyer, Chairman of the Social Security Board of the United States of America.

The primary interest of the Statute is that it is, so far as the writer is aware, the first international instrument constituting a permanent agency of regional coöperation in close association with a world organization. The closest association with the International Labor Organization is indeed the keynote of the Statute. The Inter-American Conference on Social Security is to "act in concert with the International Labor Office." It is to be "inspired by the principles concerning social security approved by" the tripartite Labor Conferences of American States held by the International Labor Organization. The International Labor Organization is entitled to be represented on the Permanent Inter-American Committee on Social Security by a tripartite delegation appointed by the Governing Body of the International Labor Office and the Director of the International Labor Office, while coördination with the work of other inter-American agencies is to be secured by the membership of the Permanent Committee of the Director General of the Pan American Union and the Director of the Pan American Sanitary Bureau. The Secretary General of the Committee is to be

appointed by the Director of the International Labor Office from among his assistants at the request of the Committee and in consultation with it. The Director of the International Labor Office is to report to the Conference and the Committee regarding international developments and to the Governing Body of the International Labor Office regarding the work of the Conference and the Committee. The provisions of the Statute concerning the Governing Body, and presumably any later modification of them, require the approval of the Governing Body. The Statute thus has something of the nature of an agreement between the Inter-American Social Security Conference and the International Labor Organization defining a *modus operandi* for co-operation between them. It may prove to be a significant precedent for further developments in the relationships between regional international bodies in different parts of the world and international institutions of a world-wide character.

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THE FUTURE OF INTERNATIONAL COMMISSIONS

Students of international affairs have long pointed to the growth of international commissions as necessary and desirable because of the importance of joint research in matters affecting the welfare of more than one State, "the advantage of permanence, of continuous activity, of technical study, and accumulating experience," and the removal of many questions "from the arena of political or diplomatic controversy, without too much sacrifice of national sovereignty and other prejudices."¹

Despite the obvious advantages which attend their activity, these bodies have not been able to function at maximum efficiency. Many of them have had little real power, and others have been created in haphazard fashion with the result that there is "no central direction, no bureau of research or recommendation, no central agency to secure coördination, or to propose new functions."² Eagleton hoped that the League of Nations would provide a solution of this difficulty, but, although Geneva did discuss the problem of its authority over existing international bureaus and commissions and did advance the cause of coördination, its success was far from complete. J. B. Condliffe writes that, although several technical organizations were incorporated in the League, "the most effective of them all, the Universal Postal Union, never became a part of the League machinery," and that "in the economic sphere the most important aspect of international relations escaped the competence of League organs."³

Within the League much excellent work was done, but as time went on the

¹ Clyde Eagleton, *International Government* (1932), 269.

² *Ibid.*, p. 271.

³ J. B. Condliffe, *The Reconstruction of World Trade* (1940), pp. 383-84.

need of better coördination of the technical bodies became apparent, and in its report of August 22, 1939, the Bruce Committee proposed that all of the economic and social activities of the League of Nations be brought under an effective representative agency which would then be able to supervise and direct the various departments the work of which had become increasingly interconnected. It accordingly submitted to the Assembly a draft constitution for a Central Committee for Economic and Social Questions. The Committee should comprise representatives of 24 States, chosen for one year by the Assembly, and should be responsible for developing more comprehensive policies and for avoiding overlapping and duplication of effort.⁴

Meanwhile an unfortunate tendency had been developing within the Secretariat. The founders of the League had contemplated a genuinely international body of impartial experts, a civil service transcending national loyalties and policies. The League staff regulations and the Balfour Report of 1920 gave expression to this ideal. As the years went by it became more difficult to maintain the standards thus set up: the highest posts within the Secretariat tended to be regarded as "plums" for diplomats temporarily on leave from their national duties. The Fascist and Nazi Governments, prior to their withdrawal from the League, exercised considerable pressure upon the Italian and German representatives in the Secretariat, and political rivalries over appointments became so marked that a committee was appointed to examine the problem. Its findings were not conclusive and the difficulty remained; nevertheless, although some governments tended to weaken the Secretariat by diplomatic appointments, that body proved itself to be a civil service of extraordinary ability and devotion.

If the world is to be sensibly organized after the war, it will need more and not fewer international institutions. During the emergency period which will follow the end of the fighting, urgent tasks will confront governments and peoples. Famine and disease will threaten the defeated nations, civil disorder will follow the collapse of the ruling régimes, economic chaos will occur unless the exhausted countries are helped "to reopen their industries, restore their finances, re-employ their labor, and establish social service."⁵ Uprooted peoples must be resettled and derelict colonies administered. Universities and schools must be reopened, churches rebuilt, and, indeed, in some cases, cities called back to life. After the emergency period will come the longer and still greater task — building and maintaining a sounder international order, so that peace, stability and welfare may be guaranteed.

Fortunately some agencies are at hand to assist in meeting these gigantic problems. Not a few of the existing war organizations "will by their nature be useful for peace-time purposes"; a great amount of experience gained after the last war is still available, for many members of the Hoover and

⁴ League of Nations, *The Development of International Coöperation in Economic and Social Affairs*, 1939.

⁵ Commission to Study the Organization of Peace, *Second Report*, New York, 1942, p. 11.

Nansen missions, the Friends Service and other agencies can be called upon for help; the League and International Labor Organizations are preparing for the post-war period; and thousands of national government administrative experts should be in a position to render valuable service.

The question arises whether sufficient attention is being paid to the problem of international commissions and the part which they can play in future world society, whether we are taking into account the lessons of the past, and whether certain tendencies on the American continent do not indicate a policy of drift, without adequate thought of the principles and policies which should govern the constitution, scope and activity of these international commissions and bureaus. For, as Condliffe well writes,⁶ "the greatest responsibility must inevitably devolve upon the United States. The responsibility may be unsought and unwelcome; but it is inescapable. Not what Americans think but what the United States does, will largely determine the pattern of international relations for the immediate future."⁷ The same writer has emphasized that, if international commissions are to function effectively, "rather radical changes" will be required in their administrative organization. Referring to the League, he advocates that the Assembly be given "ultimate control not only over the technical and political organs of a reconstituted League, but also over the other technical organs of international coöperation—an International Bank, the International Labor Office, the International Institute of Intellectual Coöperation, the International Institute of Agriculture, the International Cinematographic Institute, the Permanent Court of International Justice, and even the Universal Postal Union. These institutions might well retain a considerable measure of autonomy and be located in different centers; but they should at least submit regular reports of their activities for debate by the international assembly."⁸

If Condliffe's suggestions are sound in principle, and there is good reason to believe that they are, it may well be asked whether the commissions operating on the American continent are tending to grow up in a haphazard manner, and whether, should the number of such agencies increase, a comprehensive policy is being adopted so as to avoid the errors of overlapping and duplication and in order to promote maximum efficiency. One of the most striking examples of the benefits of international coöperation is afforded by the work of the International Halibut and Sockeye Salmon Commissions; elsewhere the present writer has ventured the judgment that in some respects the methods and work of these bodies illustrate international organization at its best, and that in a highly specialized economic world "it would appear that

⁶ J. B. Condliffe, *op. cit.*, p. 392.

⁷ *Idem.*

⁸ *Ibid.*, p. 386. A contrasting view holds that there is much to be said for retaining a considerable degree of elasticity in the organization of world technical coöperation. It will not materially affect the argument that a better coördination of international commissions on the American continent is much needed.

the threefold coöperation of governments, scientific experts, and trade interests, including labor and capital, will produce the maximum results.”⁹

Nevertheless, one cannot avoid asking whether the same forces which have militated against the best use of international commissions abroad may not in time arise in this part of the world, and whether other awkward and possibly serious questions may not arise. The policy of conservation of fisheries may be expanded; indeed present indications of the need for such a step seem sufficient to justify the hope that international regulation will be adopted for the Columbia River, the Great Lakes, the salmon fisheries off Alaska, and some of the United States-Mexican fisheries. At the end of the war we may also expect that the Fur Seal Treaty will be revived. Moreover, in the Fraser River there exist five species of salmon, and the conservation work being carried out by the International Salmon Commission for one of the species could be applied with great efficiency and at little extra expense for all five.

If separate commissions should be appointed for all these projects on an *ad hoc* basis, and if no attempt were made to work out a general policy and to establish an agency possessing adequate coördinating power, such as Condliffe has suggested for the League Assembly, certain unfortunate results would occur. It cannot be too strongly emphasized that a serious danger exists that haphazard development will result in a vast repetition and overlapping of functions, unnecessary multiplications of commissions, unwieldiness and decline in efficiency. A number of relatively low-class organizations may well be the outcome, with a deterioration in the quality of experts attracted to the work.

Unless great care is taken, national government departments will tend to regard the representatives on the international commissions as subordinate officials, and perhaps to treat the commissions themselves as a subdivision of their own national organizations. In time, an excessive power may grow up around a subordinate official within the department, since there is a temptation for harried heads and chiefs to turn over all but important questions to men under them. In this way minor officials may come to gain a real power of decision over the international commissions. It is important, therefore, to insure that the commissions should always have direct access to the highest national authorities and continue to enjoy the maximum autonomy.

If, on the other hand, a genuine and adequate international agency is established with real policy-making power, men of real caliber will be attracted, long term projects may be planned, subordinate commissions appointed, and unnecessary duplication avoided.

The International Joint Commission, set up many years ago by the Governments of the United States and Canada, was given broad powers to prescribe conditions and (after agreement between the two governments) issued orders setting up boards, such as the St. Mary's River Board, the St. Croix

⁹ Linden A. Mander, *Foundations of Modern World Society* (1941), p. 394.

River Board, and the St. Lawrence River Board. The exact meaning of Article VIII of the 1909 treaty need not be discussed here. It is sufficient to point out that the Commission was granted broad quasi-judicial, broad executive and extensive investigation powers.

The International Joint Commission may, or may not, serve as the model in the establishment of international commissions with more specific functional purposes. That the general principle of granting commissions adequate power is sound cannot be doubted. But the tendency in the fisheries commissions may be in the opposite direction. At present the Sockeye Salmon and the Halibut Commissions each has a separate statistical division, and the layman is inclined to ask whether under these circumstances overlapping does not occur, whether one outstanding person could not manage the statistical work of both commissions and achieve more effective correlation, and whether overhead costs would not be lessened through the reduction of office expenditure, postage, equipment, etc., and of the number of salaried officials.

The United States has had an all too unfortunate experience of the chaotic multiplication of the agencies of government. The states have permitted hundreds of them to grow up, "largely independent of one another, and performing their several functions with little or no regard for the work of other branches of the state government."¹⁰ Some reorganization has taken place, but, according to Macdonald, "most states still struggle under the handicap of disintegrated administration, with the responsibility for the proper conduct of their administrative affairs scattered among sixty, seventy or even eighty independent agencies." Without doubt the unsatisfactory condition of American state political life is largely traceable to the weakness of the administrative system. One need only to refer to the report of the President's Reorganization Committee in order to draw attention to the problem of administrative coordination in national life. And we may anticipate similar trouble in the international field if similar tendencies continue in this arena of human effort.

In addition there will develop another unfortunate condition. In American state governments the low status of administrative agencies has been accompanied not only by a poor standard of personnel, but also by an excessive amount of local pressure interests which attempt to dominate the government for their own selfish purposes. Unless the international commissions can form part of a highly esteemed and effective system, it may well happen that they will experience the same baneful effects as do our state and national agencies of government. We have no right to assume that pressure interests will not try to gain undue advantages in the international realm—indeed, the chances are that existing commissions have had to battle against local demands for representation on the commissions. Undoubtedly there is a strong temptation for economic groups with a limited outlook to desire

¹⁰ Austin F. Macdonald, *American State Government and Administration* (1940), p. 316.

to have a representative of their interests elected to an international commission, particularly where the conservation of resources is concerned. Certainly, local pressure groups have profoundly affected the course of international relations because of their success, through log-rolling and other methods, in raising national tariff barriers. The best way of minimizing this kind of pressure is to enhance the power and prestige of the commissions, so as to make them able to withstand the forces making for the sacrifice of scientifically determined policies to the immediate interest of a self-seeking group which may not hesitate to use its influence in national circles to discredit the international agency.

Nations with a federal form of government present peculiar difficulties in the realm of international regulation. For, although the national government may sign an international treaty or agreement, the constitution may provide that the control over the subject matter in question lies with the states or provinces. Canada, Australia and the United States have each encountered obstacles in the application of international labor conventions signed by their respective federal governments. Within the United States jurisdiction over fisheries was not delegated to the federal government, which, except for the regulation of the interstate commerce aspects, has no legal standing. For many years the State of Washington and the Province of British Columbia attempted in vain to reach an agreement over the sockeye salmon, and not until the two national governments negotiated a treaty was a satisfactory method adopted and adequate machinery established. The federal government under its treaty power was able to do what it could not have done within the United States itself. The same story may be repeated in the case of the Columbia River fisheries. The states of Oregon and Washington have been unable to agree on a policy for handling the question, and the deadlock apparently has stimulated a demand for a treaty, not so much because the treaty would coördinate the interests of the United States and Canada, but because it will offer a means of escape from the Washington-Oregon rivalry.

Will the Federal Government increase its power over the states by these methods? This question has been frequently discussed by constitutional lawyers and may assume added importance if the necessity of international regulation should increase to an appreciable degree. Given careful study and a broad enough vision, there need be no fear that international organization may add to the perils of local independence by reason of ever greater domination by the wider units of government. In discussing health as an international problem, the present writer suggested that the existence of vigorous local governments might "facilitate the coöperation of national governments, for local authorities may continue to act as valuable sources of local information and supply the local initiative which is so important if centralization of decision is not to produce bureaucratic domination. Close consultation between local and national authorities should continue, and

international affiliations of local bodies and professional associations should be encouraged. In this way vocational education and rich community life can make possible a large degree of creativeness and local freedom which must form the more intimate basis of a widespread international coöperation."¹¹ The same judgment may well apply to state governments, and it is heartening to learn that the International Sockeye Salmon Commission has received fine coöperation from the state and provincial authorities of Washington and British Columbia.

Finally, the fundamental purposes of international commissions must be always kept clearly in mind, especially of those commissions which represent two or three countries only. Do they exist primarily or solely to promote the interests of the respective countries? Undoubtedly, yes. But are they to do so in an exclusive manner? And in doubtful cases of international law, or in the event of interests which overlap those of other countries, what shall be the temper which should guide them? In the case of the Pacific fisheries where the three-mile rule seems to be inconsistent with a genuinely functional approach to the problem of conservation, what shall be the next step? Shall the United States and Canada join in enunciating a new rule for the Pacific, without regard to the effect upon their interests elsewhere and especially upon the ideals for which this war is being fought? To put the question this way is to realize that the problem of the future of international commissions merges into the larger questions of peaceful change, the establishment of adequate instruments for international legislation, and of a sufficient system of security which will make peaceful change possible.

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¹¹ Linden A. Mander, *op. cit.*, p. 25.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1942

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *I. L. O. B.*, International Labor Office Bulletin; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

March, 1942

- 4/30 GERMANY—UNITED STATES. Exchange of notes at Washington for reciprocal application of the model agreement annexed to the Geneva convention of July 27, 1929, regarding repatriation and hospitalization of prisoners of war. Texts: *Ex. Agr. Ser.* No. 255.

July, 1942

- 10/August 8 CANADA—UNITED STATES. Exchanged notes at Washington regarding transfer of United States citizens from Canadian to United States forces. Texts: *D. S. B.*, Aug. 22, 1942, pp. 711–713.

- 30–September 18 JAPAN—UNITED STATES. Messages of July 30, Aug. 29 and Sept. 18 were sent to Japan concerning relief for war prisoners. Texts: *D. S. B.*, Sept. 19, 1942, pp. 768–769, Sept. 5, 1942, pp. 741–742. A Japanese broadcast protested United States charge of maltreatment of prisoners. *N. Y. Times*, Sept. 12, 1942, p. 4.

- 31/August 21 WAR CRIMES. The Netherlands Embassy and the Legations of Luxemburg and Yugoslavia in London issued a statement regarding a collective note from the governments in exile, and the French National Committee, to President Roosevelt, concerning barbaric acts committed by Germany. Text of statement: *Netherlands News* (New York), July 26/Aug. 10, 1942, pp. 81–82. Text of President Roosevelt's statement concerning atrocities against civilian populations in occupied territories: *N. Y. Times*, Aug. 22, 1942, p. 4; *D. S. B.*, Aug. 22, 1942, pp. 709–710.

August, 1942

- 16 FRANCE (Fighting). Sixteen governments recognized the validity of Fighting French passports. *B. I. N.*, Aug. 22, 1942, pp. 758–759; *London Times*, Aug. 17, 1942, p. 3.
- 17 ICELAND—UNITED STATES. Effected agreement by exchange of notes for the exchange of official publications. *D. S. B.*, Sept. 19, 1942, p. 774.
- 18–October 16 RUBBER AGREEMENTS. Signed by representatives of United States and other countries as follows: British Honduras, Aug. 18, *D. S. B.*, Aug. 22, 1942, p. 713; El Salvador, Aug. 24, *D. S. B.*, Aug. 29, 1942, p. 723; Guatemala and Mexico, Sept. 10, *D. S. B.*, Sept. 12, 1942, p. 752; Panama, Sept. 14, *D. S. B.*, Sept. 19, 1942, p. 773; Venezuela, Oct. 16, *D. S. B.*, Oct. 17, 1942, pp. 838–839.
- 19 PRIZES OF WAR. President Roosevelt signed a bill permitting prizes of war, seized by United States forces on the high seas, to be taken into the port of a co-belligerent, instead of being taken to United States ports. *N. Y. Times*, Aug. 20, 1942, p. 14.

- 22 WAR DECLARATION. The Brazilian Government recognized a state of war with Germany and Italy. *D. S. B.*, Aug. 22, 1942, p. 710; *N. Y. Times*, Aug. 23, 1942, p. 1. Text of note to Germany and Italy: p. 5.
- 22/24 AXIS POWERS (2)—BRAZIL. Brazil recognized a state of war with Germany and Italy on Aug. 22. *N. Y. Times*, Aug. 23, 1942, p. 1. Axis ships and banks were confiscated Aug. 24. *N. Y. Times*, Aug. 25, 1942, p. 1.
- 24 GREAT BRITAIN—UNITED STATES. Signed agreement at Washington for interchange of patent rights, information, inventions, designs, or processes, effective Jan. 1, 1942. Text: *Ex. Agr. Ser.* No. 268; *G. B. T. S.* No. 8 (1942) *Cmd.* 6392; this JOURNAL, Supp., p. 4.
- 24-26 NON-BELLIGERENCY. Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay granted Brazil non-belligerent status on Aug. 24. *N. Y. Times*, Aug. 25, 1942, pp. 1, 5. Ecuador and Colombia on Aug. 25 and Venezuela on Aug. 26 took the same action. *N. Y. Times*, Aug. 26 and 27, 1942, pp. 4 and 5.
- 26 FRANCE (Vichy). Announced signature of decree dissolving French Senate and Chamber of Deputies as a permanent organization. *London Times*, Aug. 27, 1942, p. 3.
- 26-September 5 JEWS IN FRANCE. According to announcement of Aug. 26 all foreign Jews in occupied France, who entered France since 1936, will be arrested and sent to work in Germany. *N. Y. Times*, Aug. 27, 1942, p. 3. United States made strong protestations. *N. Y. Times*, Sept. 5, 1942, p. 3. On Sept. 5 it was announced that all French Jews remaining in unoccupied France on Oct. 1 are to be confined in prison camps. *B. I. N.*, Sept. 19, 1942, p. 851.
- 27 BULGARIA—TURKEY. Announced a trade agreement. *N. Y. Times*, Aug. 28, 1942, p. 4.
- 28 BRAZIL—UNITED STATES. United States Board of Economic Warfare announced an agreement for the purchase by the Commodity Credit Corporation of the exportable surplus of Brazilian babassu and castor oils. *D. S. B.*, Aug. 29, 1942, p. 725; *P. A. U.*, Nov. 1942, p. 648.
- 30/September 6 GERMANY—LUXEMBURG. Nazi Gauleiter in Luxemburg announced Hitler had incorporated the Grand Duchy in the Reich. *Luxembourg Bulletin* (Montreal), Oct.-Nov. 1942, p. 21. Germany announced annexation of Luxemburg on Sept. 6. *B. I. N.*, Sept. 19, 1942, pp. 853, 861.

September, 1942

- 2/November 3 UNITED STATES—YUGOSLAVIA (in exile). Raised their legations to rank of embassy. *B. I. N.*, Sept. 19, 1942, p. 870. Ambassador Biddle presented his credentials in London on Nov. 3. *N. Y. Times*, Nov. 4, 1942, p. 2.
- 3 FRANCE (Fighting)—UNITED STATES. Effected agreement by exchange of notes in London for lend-lease aid to Fighting France. *N. Y. Times*, Sept. 4, 1942, p. 14. Texts: *D. S. B.*, Sept. 5, 1942, pp. 739-740; *Journal Officiel de la France Combattante* (London), Sept. 30, 1942, p. 55.
- 3 GREAT BRITAIN—UNITED STATES. Effected agreement, with Australia and New Zealand, by exchange of notes in London, concerning aid to United States armed forces by the United Kingdom, Australia and New Zealand. *N. Y. Times*, Sept. 4, 1942, p. 14; *B. I. N.*, Sept. 29, 1942, p. 867. Texts: *D. S. B.*, Sept. 5, 1942, pp. 734-739; *London Times*, Sept. 4, 1942, p. 8; *G. B. T. S.* No. 6 (1942) *Cmd.* 6389.
- 5 ARGENTINA. President Castillo reaffirmed Argentina's intention to abide by its neutrality policy. *N. Y. Times*, Sept. 6, 1942, p. 23.

- 5 ARGENTINA—SPAIN. Signed commercial agreement at Buenos Aires. *N. Y. Times*, Sept. 6, 1942, p. 22; *D. S. B.*, Nov. 7, 1942, p. 897; *London Times*, Sept. 7, 1942, p. 3.
- 7 ARGENTINA—SPAIN. Signed general cultural agreement at Madrid. Summary: *D. S. B.*, Nov. 14, 1942, p. 930. It entered into force on the date of signature.
- 7 CUBA—UNITED STATES. Signed military and naval coöperation agreement at Havana. *D. S. B.*, Sept. 12, 1942, pp. 750-751; *N. Y. Times*, Sept. 8, 1942, p. 4.
- 7-18 PAN AMERICAN SANITARY CONFERENCE. Eleventh conference was held at Rio de Janeiro. It considered problems connected with the war situation, especially related to continental defense. Next meeting will be held at Caracas, Venezuela, in 1946. *D. S. B.*, Oct. 17, 1942, pp. 839-840.
- 8 CANADA—SOVIET RUSSIA. Signed agreement in London giving Russia credit for the purchase of wheat in Canada. *London Times*, Sept. 9, 1942, p. 2; *B. I. N.*, Sept. 19, 1942, pp. 850 and 856.
- 8 ECUADOR—UNITED STATES. United States Department of State announced establishment of United States bases in the Galápagos Islands and on the mainland of Ecuador for the better protection of the Panama Canal. *N. Y. Times*, Sept. 9, 1942, p. 3; *P. A. U.*, Nov. 1942, p. 648.
- 8 FRANCE (Vichy)—UNITED STATES. United States announced rejection of French protests of recent bombings and warned of future attacks. *N. Y. Times*, Sept. 9, 1942, pp. 1, 8; *D. S. B.*, Sept. 12, 1942, p. 750.
- 9 FRANCE (Vichy). In a letter to Marshal Pétain and Chief of State Laval, M. Jeanneney and M. Herriot, Presidents of the Senate and Chamber of Deputies of the suppressed Parliament, warned against any move to draw France to the side of the Axis Powers. *N. Y. Times*, Sept. 10, 1942, p. 1. Excerpts: p. 8.
- 10 INDIA. Text of Prime Minister Churchill's statement in the House of Commons: *N. Y. Times*, Sept. 11, 1942, p. 8; *London Times*, Sept. 11, 1942, p. 8.
- 10-16 INTER-AMERICAN CONFERENCE ON SOCIAL SECURITY. Met at Santiago, Chile. *N. Y. Times*, Sept. 11, 1942, p. 5. United States delegates: *D. S. B.*, Sept. 5, 1942, p. 743. Summary of work; *N. Y. Times*, Sept. 18, 1942, p. 11; this *JOURNAL*, *supra*, p. 120.
- 11 INDIA—UNITED STATES. United States Department of State announced the submission of the final report of the American Technical Mission to India. *D. S. B.*, Sept. 11, 1942, p. 749; *N. Y. Times*, Sept. 12, 1942, p. 4.
- 12 CHINA—VENEZUELA. Established diplomatic relations. *N. Y. Times*, Sept. 12, 1942, p. 3.
- 16-November 6 MADAGASCAR. The French commander on the island asked for truce terms on Sept. 16, which were rejected next day. *London Times*, Sept. 17, 1942, p. 4; *N. Y. Times*, Sept. 17, 1942, pp. 1, 8; Sept. 18, 1942, p. 8. An armistice was announced Nov. 6, ending hostilities between Vichy French and British forces. Terms were not made public. *N. Y. Times*, Nov. 7, 1942, p. 4.
- 18 RUMANIA—TURKEY. Signed trade agreement at Ankara. *B. I. N.*, Oct. 31, 1942, p. 916.
- 19 FINLAND. The Legation in Washington issued statement on war aims. Excerpts: *N. Y. Times*, Sept. 20, 1942, p. 5.
- 25 BRAZIL—UNITED STATES. Signed temporary agreement at Rio de Janeiro providing credit of \$14,000,000 for the construction of the Victoria-Mina Geraes Railway. *N. Y. Times*, Sept. 26, 1942, p. 3.

- 25 PORTUGAL—SPAIN. Announcement was made of an exchange of notes reaffirming mutual amity. *London Times*, Sept. 26, 1942, p. 3.
- 28 FRANCE (Fighting)—SOVIET RUSSIA. Text of statement relative to the definition of Fighting France and of the French National Committee: *Journal Officiel de la France Combattante* (London), Sept. 30, 1942, p. 55; *N. Y. Times*, Sept. 29, 1942, p. 7.
- 28 GREAT BRITAIN—UNITED STATES. Announced an agreement providing for exclusive purchase by the United States in certain regions of fats and oils for the benefit of the United Nations. In other regions the United Kingdom will be the purchaser. *D. S. B.*, Oct. 3, 1942, p. 791.
- 28 INTERNATIONAL TIN COMMITTEE. The Committee, composed of representatives of Belgium, Bolivia, The Netherlands and Great Britain, met in London. Its aim is to encourage maximum possible tin production in all territories not under enemy control. *Netherlands News* (N. Y.), Sept. 26/Oct. 10, 1942, p. 210.
- 29 CZECHOSLOVAKIA (in exile)—FRANCE (Fighting). General de Gaulle declared that Fighting France rejected the Munich Pact, and that the Fighting French National Committee did not recognize territorial alterations respecting Czechoslovakia. *N. Y. Times*, Sept. 30, 1942, p. 5. Text of statement: *Inter-Allied Review* (New York), Oct. 15, 1942, pp. 248-249. Texts of letters exchanged: *Journal Officiel de la France Combattante* (London), Sept. 30, 1942, pp. 55-56.
- 29 GREAT BRITAIN—VENEZUELA. The islet of Patos, in the Bay of Paris, near Trinidad, was transferred to the Venezuelan Foreign Minister by the British Governor at Port of Spain. *London Times*, Sept. 30, 1942, p. 4.
- 30 CANADA—UNITED STATES. Exchanged notes at Washington in regard to procedure for service in United States armed forces of American citizens residing in Canada. Texts: *D. S. B.*, Oct. 3, 1942, pp. 789-790.

October, 1942

- 1 GERMANY—SLOVENIA, NORTHERN. Germany formally annexed Northern Slovenia, and declared all inhabitants would be henceforth German subjects. *London Times*, Oct. 6, 1942, p. 3.
- 1 WESTMINSTER STATUTE. Australian Attorney General asked leave to introduce a bill in the Australian Parliament to ratify certain sections of the Statute. *London Times*, Oct. 2, 1942, p. 3. It is intended to remove certain legal difficulties now hampering Commonwealth legislation. *London Times*, Oct. 3, 1942, p. 3.
- 2 CUBA—MEXICO. Announced signature of a treaty for exchange of facilities and information in their common war effort. *N. Y. Times*, Oct. 3, 1942, p. 6.
- 5 ARGENTINA. President Castillo took full charge of the government and will rule by decree. *London Times*, Oct. 6, 1942, p. 3.
- 6 GREAT BRITAIN—SOVIET RUSSIA—UNITED STATES. Signed protocol at Washington, prolonging indefinitely the pact, known as the Moscow Protocol, signed Oct. 1, 1941. *D. S. B.*, Oct. 10, 1942, p. 805; *N. Y. Times*, Oct. 7, 1942, pp. 1, 12. The text was not made public.
- 6/30 GREECE (in exile)—UNITED STATES. Newly appointed Greek Ambassador and Ambassador Biddle presented their credentials. *D. S. B.*, Oct. 10, 1942, p. 826; *N. Y. Times*, Oct. 31, 1942, p. 6.
- 7 DENMARK—ICELAND—UNITED STATES. Iceland's Prime Minister made public a formal United States note, received on Sept. 20, suggesting that the *status quo* be

maintained, instead of severing Iceland's ties under the terms of the Danish-Icelandic Act of Union of 1918, when it expires Dec. 31, 1943. *N. Y. Times*, Oct. 8, 1942, p. 9.

- 7 FRANCE (Occupied)—UNITED STATES. Text of American warning on future bombings in occupied France: *N. Y. Times*, Oct. 8, 1942, p. 6.
- 7-November 2 WAR CRIMES. Text of President Roosevelt's statement of Oct. 7 regarding a United Nations Commission to investigate war crimes: *D. S. B.*, Oct. 10, 1942, p. 797. Text of Soviet declaration concerning the responsibility of Hitlerite invaders and their associates for crimes committed in occupied countries in Europe: *N. Y. Times*, Oct. 16, 1942, p. 8. Announcement was made of a decree of the Polish Cabinet concerning punishment for German war crimes. *London Times*, Oct. 20, 1942, p. 3. The Soviet Presidium issued decree authorizing a commission to investigate life and property damage resulting from the German invasion, to assess the amount of reparation due to Russia and to identify the guilty whenever possible. Text of decree: *N. Y. Times*, Nov. 5, 1942, p. 10.
- 8-14 CHILE—UNITED STATES. Acting Secretary of State Welles stated Oct. 8 in a speech at Boston that Axis agents in Chile had transmitted information leading to the sinking of ships in American waters. Chilean Government protested Oct. 10, and on Oct. 12 the Chilean Ambassador notified Mr. Welles that the Chilean President's visit to the United States had been postponed. *N. Y. Times*, Oct. 13, 1942, pp. 1, 10. President Roosevelt invited President Rios again on Oct. 14 to make his visit. *D. S. B.*, Oct. 17, 1942, p. 838.
- 9 CHINA—GREAT BRITAIN. Great Britain announced its willingness to open discussions concerning abolition of extraterritoriality in China. *B. I. N.*, Oct. 17, 1942, p. 951.
- 9 UNITED NATIONS—ETHIOPIA. Exchange of messages between Emperor Haile Selassie and President Roosevelt was announced, by which Ethiopia joined the United Nations. *London Times*, Oct. 10, 1942, p. 4; *N. Y. Times*, Oct. 10, 1942, p. 4. Texts: *D. S. B.*, Oct. 10, 1942, p. 805.
- 9/24 CHINA—UNITED STATES. United States announced its willingness to abolish by treaty the system of extraterritoriality in China. *N. Y. Times*, Oct. 10, 1942, pp. 1, 5; *D. S. B.*, Oct. 10, 1942, p. 805. Texts of messages exchanged by President Roosevelt and Generalissimo Chiang Kai-shek: *D. S. B.*, Oct. 17, 1942, p. 839. Secretary of State Hull handed to the Chinese Ambassador for the consideration of the Chinese Government a draft treaty for the relinquishment of extraterritoriality. *D. S. B.*, Oct. 24, 1942, p. 855.
- 14 GUATEMALA—UNITED STATES. Signed an agreement for the construction of a military road through Guatemala. *C. S. Monitor*, Oct. 28, 1942, p. 1.
- 16 ARGENTINA—UNITED STATES. Announced an agreement for use of United States ports by Argentine government-owned vessels. *N. Y. Times*, Oct. 17, 1942, p. 7.
- 16 CUBA—SOVIET RUSSIA. Established diplomatic relations. *N. Y. Times*, Oct. 17, 1942, p. 6.
- 16 NOBEL PRIZES. Swedish-American News Exchange announced it had been informed that no Nobel Prizes would be awarded in 1942. The last previous awards were in 1939, and the last peace award in 1938. *N. Y. Times*, Oct. 17, 1942, p. 12.
- 19 AXIS POSTAL UNION. Thirteen Axis or Axis-controlled countries signed at Vienna a convention for the formation of a European postal and communications union, which will take effect April 1, 1943. Switzerland sent two observers. Turkey and Sweden did not participate officially. *N. Y. Times*, Oct. 20, 1942, p. 5.

- 19 ITALY—UNITED STATES. As of this date Italian aliens in the United States will no longer be classed as alien enemies according to a speech of Attorney General Biddle on Oct. 12. Text of address: *N. Y. Times*, Oct. 13, 1942, p. 12.
- 21 CANADA—UNITED STATES. Announced submission of report by the International Board of Inquiry, established Feb. 29, 1940, to study conservation of fisheries. Recommendations: *D. S. B.*, Oct. 24, 1942, pp. 858-859.
- 21 SMUTS, JAN C. Addressed the Houses of Parliament on war and peace aims. Text: *London Times*, Oct. 22, 1942, pp. 4, 8. Excerpts: *N. Y. Times*, Oct. 22, 1942, p. 10.
- 23-28 INTER-AMERICAN MUNICIPAL HISTORICAL CONGRESS. First congress met at Havana with 16 nations represented. Next congress to be held at Lima, Peru, the date to be announced. *N. Y. Times*, Oct. 29, 1942, p. 5.
- 27 CHINA—NORWAY (in exile). Chinese spokesman announced negotiations were in progress for a treaty renouncing extraterritorial claims in China. *N. Y. Times*, Oct. 28, 1942, p. 19.
- 27 DENMARK. King Christian X signed a decree naming Crown Prince Frederick as regent during his illness. *London Times*, Oct. 29, 1942, p. 4; *N. Y. Times*, Oct. 28, 1942, p. 11.
- 28 ARGENTINA—BOLIVIA. Both houses of Argentinian Congress ratified recently enacted pacts whereby Argentina will finance Bolivian railway and petroleum development. *N. Y. Times*, Oct. 30, 1942, p. 7.
- 29 CHINA—VATICAN. China announced appointment of Dr. Sie Cheoukang as first Minister to the Vatican. *London Times*, Oct. 30, 1942, p. 3.
- 30 BELGIUM (in exile)—GERMANY. Belgium formally protested forcible deportation of Belgian workers for labor in Germany. *N. Y. Times*, Oct. 31, 1942, p. 5.
- 30 MEXICO—UNITED STATES. Announced an agreement for the purchase of Mexican petroleum. *N. Y. Times*, Oct. 31, 1942, p. 4.

November, 1942

- 5 CHILE—VENEZUELA. Renewed the most-favored-nation clause of their commercial treaty which lapsed in October, 1941. *N. Y. Times*, Nov. 6, 1942, p. 2.
- 5 FRANCE (Vichy). Published list of names of Frenchmen who have been stripped of their nationality by the Government. *N. Y. Times*, Nov. 6, 1942, p. 8.
- 6 DANISH PORTS. Neutral shipping to be denied entry, excepting ships in distress. *N. Y. Times*, Nov. 7, 1942, p. 2.
- 6/7 SOVIET RUSSIA. Texts of Stalin's speech on war and Soviet international policy, and his order of the day: *N. Y. Times*, Nov. 7, 1942, p. 6.
- 7-8 FRANCE (Vichy)—UNITED STATES. French text of President Roosevelt's message of Nov. 7 to the French people: *Cong. Record* (daily), Nov. 13, 1942, p. 9103. English text of same and proclamation issued by Lieut. General Eisenhower: *D. S. B.*, Nov. 7, 1942, pp. 891-892; *N. Y. Times*, Nov. 8, 1942, p. 8; *Cong. Record* (daily), Nov. 9, 1942, pp. 9009-9010. Texts of President Roosevelt's message of Nov. 8 to Marshal Pétain and his reply: *Cong. Record* (daily), Nov. 9, 1942, p. 9010; *N. Y. Times*, Nov. 9, 1942, p. 10; *D. S. B.*, Nov. 14, 1942, pp. 904-905.
- 7-15 WORLD WAR. United States armed forces landed at numerous points on the Atlantic and Mediterranean coasts of French North Africa. Text of White House statement: *Cong. Record* (daily), Nov. 9, 1942, p. 9009; *D. S. B.*, Nov. 7, 1942, p. 891;

- N. Y. Times*, Nov. 8, 1942, p. 1. English version of Lieut. General Eisenhower's message to people of North Africa: p. 8. With the surrender of Casablanca on Nov. 11 practically all resistance in Morocco and Algeria ended. *N. Y. Times*, Nov. 12, 1942, p. 1. On Nov. 13, Admiral Darlan announced he had assumed full responsibility for French interests in North Africa. Text of proclamation: *N. Y. Times*, Nov. 14, 1942, p. 6. Declaring his loyalty to Marshal Pétain, now in German control, Admiral Darlan proclaimed himself protector of French interests in North Africa and appointed General Giraud commander in chief of all French forces. *N. Y. Times*, Nov. 16, 1942, pp. 1, 6.
- 8 FRANCE (Vichy)—UNITED STATES. Diplomatic relations broken off by France. *N. Y. Times*, Nov. 9, 1942, p. 1.
- 8/12 PORTUGAL—UNITED STATES. Text of President Roosevelt's message of Nov. 8 to President Carmona of Portugal in connection with military operations in French North Africa: *Cong. Record* (daily), Nov. 9, 1942, p. 9010; *N. Y. Times*, Nov. 9, 1942, p. 10. President Carmona's reply was made public on Nov. 12. *N. Y. Times*, Nov. 13, 1942, p. 7. Texts of both messages: *D. S. B.*, Nov. 14, 1942, pp. 905-906.
- 8-13 SPAIN—UNITED STATES. Text of President Roosevelt's message to General Franco on Nov. 8, in connection with military operations in French North Africa: *Cong. Record* (daily), Nov. 9, 1942, p. 9010; *N. Y. Times*, Nov. 9, 1942, p. 10. The White House announced Nov. 10 that General Franco had agreed to preserve neutrality in Africa. *N. Y. Times*, Nov. 11, 1942, p. 9. Text of Gen. Franco's letter was made public on Nov. 13: *N. Y. Times*, Nov. 15, 1942, p. 12. Texts of both messages: *D. S. B.*, Nov. 14, 1942, pp. 906-907.
- 9 CANADA—FRANCE (Vichy). Diplomatic relations broken off by Canada. *N. Y. Times*, Nov. 10, 1942, p. 1.
- 9 FRANCE (Vichy)—MEXICO. Diplomatic relations broken off by Mexico. *N. Y. Times*, Nov. 10, 1942, p. 1.
- 9 FRANCE (Vichy)—UNITED STATES. Texts of President Roosevelt's messages to the Bey of Tunis and the Resident General at Tunis, Admiral Esteva: *N. Y. Times*, Nov. 10, 1942, p. 5; *D. S. B.*, Nov. 14, 1942, pp. 907-908. Text of message to the Governor General of Algeria: p. 907.
- 10 CUBA—FRANCE (Vichy). Cuba announced severance of diplomatic relations. *N. Y. Times*, Nov. 11, 1942, p. 5.
- 10 FRANCE (Vichy)—HAITI. Diplomatic relations severed by Haiti. *N. Y. Times*, Nov. 11, 1942, p. 5.
- 11 FRANCE (Vichy)—GERMANY. German troops moved into France with orders to occupy Toulon, Marseille and other points on the Mediterranean coast. *N. Y. Times*, Nov. 12, 1942, pp. 1, 4. Texts of Hitler's letter to Pétain and Hitler's appeal to the French people: p. 4.
- 13 INTER-AMERICAN COMMISSION OF WOMEN. At its 3d annual meeting the Commission adopted resolutions approving opening of a new front in the war by the United States in Africa and urging hemispheric solidarity. *N. Y. Times*, Nov. 14, 1942, p. 6.
- 14 BLACKLIST. Revision IV was issued. Text: *Dept. of State Publication* No. 1828.
- 14 DOMINICAN REPUBLIC—UNITED STATES. Exchanged notes agreeing not to invoke certain provisions of the agreement of Sept. 25, 1924 (reciprocal unconditional most-favored-nation clause in customs matters). Texts of notes: *D. S. B.*, Nov. 21, 1942, pp. 953-954.

- 14 EL SALVADOR—FRANCE (Vichy). El Salvador notified French Minister Plenipotentiary that diplomatic relations had been broken. *N. Y. Times*, Nov. 15, 1942, p. 38.
- 14 FRANCE (Vichy)—PANAMA. Diplomatic relations broken off by Panama. *C. S. Monitor*, Nov. 14, 1942, p. 1.
- 14 MARTINIQUE. Admirable Robert, High Commissioner for French West Indies and French Guiana, urged the people to obey Marshal Pétain. *N. Y. Times*, Nov. 15, 1942, p. 7.
- 15 ANDORRA—GERMANY. Hitler guaranteed territorial integrity of Andorra. *N. Y. Times*, Nov. 17, 1942, p. 9.

INTERNATIONAL CONVENTIONS

- AXIS POSTAL UNION. Vienna, Oct. 19, 1942.
Signatures: Albania, Bulgaria, Croatia, Denmark, Finland, Germany, Hungary, The Netherlands, Italy, Norway, Rumania, San Marino, Slovakia.
In force: April 1, 1943. *N. Y. Times*, Oct. 20, 1942, p. 5.
- INDUSTRIAL DESIGNS AND MODELS. London, June 2, 1934.
Adhesion: Tunisia (effective Oct. 4, 1942). *D. S. B.*, Nov. 14, 1942, p. 931.
- INDUSTRIAL PROPERTY. London, June 2, 1934.
Adhesion: Tunisia (effective Oct. 4, 1942). *D. S. B.*, Nov. 14, 1942, p. 930.
- LETTERS, ETC., OF DECLARED VALUE. Buenos Aires, May 23, 1939.
Application to: French West Africa. June 1, 1942. *D. S. B.*, Oct. 31, 1942, p. 888.
- LOAD LINE CONVENTION. London, July 5, 1930.
Suspension (until six months after cessation of hostilities): Great Britain. *D. S. B.*, Oct. 24, 1942, pp. 859-860.
- MERCHANDISE MARKS. Madrid, April 14, 1891. Revision. London, June 2, 1934.
Adhesion: Tunisia (effective Oct. 4, 1942). *D. S. B.*, Nov. 14, 1942, p. 930.
- MONEY ORDERS. Buenos Aires, May 23, 1939.
Application to: French West Africa. June 1, 1942. *D. S. B.*, Oct. 31, 1942, p. 888.
- PARCEL POST. Buenos Aires, May 23, 1939.
Application to: French West Africa. June 1, 1942. *D. S. B.*, Oct. 31, 1942, p. 888.
- SUGAR PRODUCTION AND MARKETING. Protocol. London, July 22, 1942.
Signatures: Brazil and Portugal. *D. S. B.*, Oct. 17, 1942, p. 841.
- TRADE-MARKS REGISTRATION. The Hague, Nov. 6, 1925. Revision, London, June 2, 1934.
Adhesion: Tunisia (effective Oct. 4, 1942). *D. S. B.*, Nov. 14, 1942, p. 931.
- UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.
Application to: French West Africa. June 1, 1942. *D. S. B.*, Oct. 31, 1942, p. 888.

DOROTHY R. DART

[TRANSLATION]

SUPREME COURT OF SWEDEN

JUDGMENT IN THE "RIGMOR" CASE

Stockholm, March 17, 1942

Requisition by the Norwegian Government of Norwegian vessels outside occupied areas in Norway and belonging to owners domiciled within said areas, recognized as valid against a claim to a Norwegian vessel lying within Swedish waters brought by private owners domiciled in Oslo.

Held, that the British Government, as charterer of the vessel from the Norwegian Government for public use, is, under international law, immune from legal process instituted by the private owners to arrest the vessel and prevent its departure from Sweden. The Brussels Convention of 1926 concerning state-owned ships engaged in commerce held not applicable.

HIS MAJESTY'S judgment on the appeal of His Britannic Majesty's Government and the Royal Norwegian Government, as well as of J. R. Nicol and William Gilling, against a judgment pronounced by the Royal Göta Court of Appeal on the 15th December 1941 in the proceedings referred to below, the documents in which establish the following facts:

In an application received at the Office of the Executor-General, Gothenburg, 19th September 1941, Messrs. Waages Tankrederi A/S of Oslo made the following representations: The company owned the motor tanker *Rigmor* then lying in the port of Gothenburg. The master of the vessel was Captain Paul Monsen. Despite repeated orders from the company, the latter had refused to leave the vessel and to hand over command of her to another master appointed by the company. Paul Monsen, who, as regards the disposal of the vessel, had, in spite of the company's protest, complied with instructions given by the Royal Norwegian Legation, intended, according to the company's information, to remove the vessel from Swedish territory. The Royal Norwegian Government had no right to dispose of the vessel. The company accordingly requested the Executor-General to order Monsen to be removed from the vessel and to place the vessel under arrest and urged that the measures asked for should be authorized immediately *ad interim*.

On the same date the Executor-General granted an arrest of the vessel *ad interim*.

Monsen declared in a written statement, which was received by the Executor-General on the 22nd September 1941, that he was no longer master of the vessel.

In a written statement received by the Executor-General on the last mentioned date, Nicol made the following representations: By virtue of an agreement concluded on the 1st July 1941, between the Royal Norwegian Government as the holder (*innehavare*) of the vessel and the Minister of War Transport in London, the Royal Norwegian Government had transferred the vessel to His Britannic Majesty's Government for use in the public service. Under the agreement His Britannic Majesty's Government had

acquired the full right to dispose of the vessel and His Britannic Majesty's Government were to be entitled to appoint a master to the same. Nicol, having been appointed by His Britannic Majesty's Government as master of the vessel, contended that in view of the aforesaid representations and on the strength of the rules regarding the immunity of property in Sweden at the disposal of a foreign State, the Executor-General was not competent to entertain the company's application, and requested the Executor-General to reject the same and immediately to discharge the *interim* arrest.

In an application which was received by the Executor-General on the 24th September 1941, the company requested the Executor-General to order Nicol's removal from the vessel.

The Executor-General gave judgment on the 24th September 1941, to the following effect: Since Monsen, whom the company had asked should be removed from the vessel, had resigned his command, the Executor-General was not required to pronounce on this part of the matter. Further, as it had been shown that the vessel was held by the British Empire through a master appointed by its Government, the Executor-General saw fit to rescind his order of the 19th September 1941 for the *interim* arrest of the vessel and to declare that he could not entertain the application for arrest or the company's request for Nicol's removal.

The company appealed against the Executor-General's decision and requested the Court of Appeal to quash the same and to grant an *interim* arrest of the vessel and to order Nicol's removal.

By a ruling on the 30th September 1941, the Court of Appeal granted an *interim* arrest on the vessel.

In a written communication submitted to the Court of Appeal on the 6th October 1941, His Britannic Majesty's Government stated that the vessel was in its possession and, invoking its right to immunity, requested that the company's suit be immediately rejected.

Nicol having represented in the Court of Appeal that a guarantee deposited by the company with the Executor-General against damages arising out of the arrest and the removal of the master did not afford adequate security, the company submitted to the Court of Appeal a guarantee from A/B Svenska Handelsbanken, dated the 15th October 1941, whereby the bank undertook to stand surety as for a debt of its own and until payment should be made in full against the company meeting its obligation to repay any damages incurred by the opposite party as a result of the grant of the arrest, subject to the reservation that the bank should not be called upon to pay more than a maximum of 500,000 Swedish kroner.

The Court of Appeal gave judgment on the 21st October 1941, on the company's appeal against the Executor-General's judgment of the 24th September 1941, to the following effect: The Court of Appeal found that, in view of the information furnished in the courts of the proceedings as to the nature of the vessel in question, the fact that the right to the use of the vessel

must have been transferred to His Britannic Majesty's Government did not prevent the company's application for arrest and for Nicol's removal from the vessel being entertained; consequently the Court of Appeal found it in conformity with law to set aside the Executor-General's judgment of the 24th September 1941, and to remit the case to the Executor-General who was required to examine it afresh. The *interim* arrest granted by the Court of Appeal on the 19th September 1941 was to be maintained until instructions were duly given to the contrary.

The Executor-General hereupon submitted the case to a fresh examination and issued a resolution on the 31st October 1941 ordering the company to serve His Britannic Majesty's Government and the Royal Norwegian Government notice of its application for arrest since their rights might be affected by the application.

In a written communication submitted to the Executor-General on the 3rd November 1941, Nicol made the following representations *inter alia*: The Royal Norwegian Government have requisitioned the vessel by virtue of a Norwegian law issued on the 18th May 1940. By a demise-charter drawn up in London on the 1st July 1941 the said Government had leased the vessel to His Britannic Majesty's Government which had taken possession of the vessel and appointed Nicol as master. The surety deposited by the company was inadequate. As master, Nicol was not competent to enter defence on the application for arrest. Nor had Nicol received any special instructions or authority so to plead. In view of these and earlier representations it was requested that the company's action be dismissed.

His Britannic Majesty's Government and the Royal Norwegian Government caused documents to be submitted to the Executor-General to the effect that the Governments claimed immunity and accordingly did not intend to make any statement.

The Executor-General gave judgment on the 6th November 1941. In virtue of the Law of the 18th May 1940 relating to the requisitioning of ships, etc., the Royal Norwegian Government had requisitioned the vessel and taken over the right to use it. In accordance with the said law, the duly appointed representative of the Government was entitled in every respect to dispose of the vessel on behalf of the Royal Norwegian Government. The original owner, on the other hand, was not permitted to use or otherwise dispose of the vessel. Infringement of this regulation, or an attempt thereat, was punishable with imprisonment for a term not exceeding one year or a fine of up to 100,000 kroner, in addition to which the vessel might be declared forfeit. Nicol had objected that the shipping company on these grounds was not competent to plead in this matter. It was incontestable that the dispute related to a Norwegian vessel and that the application had been made by a Norwegian national or a Norwegian shipping company. The Executor-General accordingly finds that the shipowners could not be deemed to be entitled to demand either the arrest

of the vessel or the eviction of the master. By a demise charter-party of the 1st July, the Royal Norwegian Government had demised the vessel to His Britannic Majesty's Government, who had taken possession and control of the vessel and appointed a master. The Executor-General had furthermore weighed the arguments and facts adduced on either side in regard to the demand for the arrest of the vessel and had taken note of the summonses which, with a view to the maintenance of the arrest, had been taken out at the Municipal Court of Gothenburg for service on His Britannic Majesty's Government and the master of the vessel. The Executor-General had found that the arguments adduced by the shipowners in support of their application for the arrest of the vessel had been so refuted by the other party that the presumptive evidence which was a condition for the grant of arrest could not be deemed to have been produced. In such circumstances the other party was entitled to have the vessel released. The Executor-General accordingly found himself called upon to declare that the *interim* order made by the Court of Appeal for the arrest of the vessel should forthwith be annulled, which decision it devolved on the chief sub-executor, on the application of the party concerned, forthwith to carry into effect. As for the request for the eviction of the master, it devolved on the shipping company to prove that he had arbitrarily taken possession, or deprived the company, of the vessel, or had otherwise arrogated to himself, or granted to another person, any other right in respect of the vessel. There was no reason even to presume that this was the case. The Executor-General accordingly found that the shipping company's request for the eviction of the master was not warranted, and therefore considered himself unable to grant the requested judicial assistance. As for the objection raised by Nicol in regard to the insufficiency of the surety, the Executor-General desired to record his view that it would not suffice in case the arrest of the vessel were maintained, but that, having for his part annulled the order of arrest, he had no reason to take any action in this matter.

The company appealed.

On the 7th November 1941, the Court of Appeal granted an *interim* arrest.

His Britannic Majesty's Government and the Royal Norwegian Government submitted documents to the Court of Appeal claiming immunity for the vessel and requesting the immediate discharge of the *interim* arrest.

Nicol and His Britannic Majesty's Government were permitted to make a statement on the appeals and the former did so. His Britannic Majesty's Government claimed immunity for the vessel and declined to make any statement.

The Court of Appeal pronounced on the 15th December 1941, as follows: The Court of Appeal cannot entertain the claim made by His Britannic Majesty's Government and the Royal Norwegian Government in regard to immunity.

The shipping company must be deemed to have adduced presumptive evidence for their contention that they have a better right to the vessel.

There is the risk that the vessel may leave for a foreign port.

The shipping company have not adduced such facts in this case that an order can be issued, in the present connection, for the eviction of Nicol.

On the ground of what has been adduced and examined, the Court of Appeal find it equitable *firstly* to reverse the decision of the Executor-General in regard to the demand *re* arrest and to resolve that the order for the arrest of the vessel issued on the 7th November 1941 shall be maintained, and *secondly* to confirm the decision of the Executor-General, in so far as the demand for the eviction of Nicol has been disallowed.

His Britannic Majesty's Government, Nicol and Gilling, the last named of whom was signed on as master of the vessel after Nicol was signed off on the 11th November 1941, have appealed against the judgment of the Court of Appeal, and the Royal Norwegian Government has appealed to His Majesty for the immediate discharge of the arrest in so far as it is not discharged as a result of the representations of His Britannic Majesty's Government.

The company has humbly submitted a statement on the appeals.

His Britannic Majesty's Government, Nicol and Gilling have each deposited with His Majesty's Lieutenant in the County of Gothenburg and Bohus on the 22nd December 1941, as is shown by the official entries Nos. 1834, 1817 and 1816, the sum of 150 kroner for litigation fees and a similar sum as surety for the opponent's costs.

HIS MAJESTY has been graciously pleased to hear a report on the appeals referred to.

The documents in the case establish the following facts.

By a provisional ordinance dated 18th May 1940, the Royal Norwegian Government declared all vessels the port of registration of which was in Norway, and which were lying outside the occupied areas of Norway and belonged to owners domiciled within the said areas, to have been requisitioned by the Government, to whom the rights of ownership were simultaneously transferred. The vessel the arrest of which has been applied for has been shown by its nationality certificate to be registered in a place situated within the area under occupation on the aforesaid date. At that date the vessel lay within Swedish territory, where she still lies. Subsequently the vessel's nationality certificate, which is kept on board, was endorsed by an official of the Norwegian Consulate in Gothenburg to the effect that the vessel had been requisitioned by the Royal Norwegian Government and was held by her captain on behalf of that Government. Similarly, at the request of the Norwegian authority deputed for the purpose by the provisional ordinance, the captain of the vessel signed a declaration to the effect that he agreed "to possess and to hold" the vessel on behalf of the Royal Norwegian Government and to comply with any instructions

which might be issued by the Norwegian Trade and Shipping Commission or its representative, and not to arrange to dispose of the vessel otherwise than with the approval of the said authorities. The maintenance and equipment of the vessel and the wages of the officers and crew were paid by the Royal Norwegian Government up to the date on which these expenses were taken over by His Britannic Majesty's Government under the agreement referred to below.

Subsequently, by virtue of an agreement termed a demise charter-party the Royal Norwegian Government, as the disponent owners, leased the vessel with its equipment and stores to the Minister of War Transport, representing His Britannic Majesty's Government, on the 1st July 1941, the vessel to be at the entire disposal and under the full control of the charterer for the period of a voyage to Great Britain, but not later than the 1st January 1942, for use for public purposes, and the charterer to have the right, in consultation with the disponent owners, to appoint officers and crew and to be responsible for payment of the same. A supplementary agreement, dated 1st November 1941, provided that the hire period, while still covering a journey to Great Britain, should be prolonged for a period of six calendar months as from the 1st January 1942.

At the time of the application for arrest the agreement had become operative and it is still operative. It has been shown in the case that the vessel was at the time when the application was submitted, and still is, held under instructions from and on behalf of the Minister of War Transport, representing His Britannic Majesty's Government.

As regards the use to which the vessel is being put, documents have been submitted to the Executor-General in which it is stated, on the one hand, by the Minister of War Transport that on the voyage for which the vessel has been hired the vessel will be used exclusively in the public service for the carriage of non-commercial cargo and that this cargo has before loading been purchased on behalf of His Britannic Majesty's Government who will have full control over it, and, on the other hand, by Sir George Binney—who, according to a statement signed by the British Minister to Sweden, represents the British Ministry of War Transport and Ministry of Supply—that the goods to be carried in the vessel consist solely of goods required for the promotion of the British war effort and that accordingly their carriage is in no way a commercial undertaking, either governmental or private.

A statement by Sir William Barrowclough Brown, permanent secretary to the British Ministry of Supply, has been produced in the Court of Appeal, in which the aforesaid, with the authority of the Minister, states on oath that he knows from personal knowledge that all cargo loaded and to be loaded on board the vessel for the voyage for which she has been chartered, consists and will consist solely of raw materials, partly and wholly finished material and machine tools purchased by His Britannic Majesty's Government, and that the entire cargo is required for the production of war material

and will be used exclusively for this purpose or for other purposes essential for the conduct of the war in which Great Britain is engaged.

The first matter to be considered is the objection raised by the appellants on the strength of the right of His Britannic Majesty's Government to immunity as to the incompetence of the Swedish executive authorities to entertain the application for arrest.

In this connection it may be stated at the outset that the facts related above imply that His Britannic Majesty's Government is in actual possession of the vessel. From this it follows that the application for arrest, although formally directed against the captain of the vessel, actually affects His Britannic Majesty's Government.

The written law of Sweden contains no provisions regarding the immunity of foreign Powers apart from the law of the 17th June 1938 containing certain provisions regarding foreign state vessels, etc., which, however, relates solely to legal action and executive measures in connection with certain claims and is thus inapplicable in the present case where the arrest has not been sought with the object of safeguarding a claim. Any conclusions drawn from the provisions of the law arising out of certain carriage conventions are likewise irrelevant.

As a general principle, with exceptions of varying extent, however, the immunity of foreign Powers must be regarded as recognized in Swedish law. There is only one known case of the immunity issue being carried to the highest instance, viz., the case reported in the *New Juridical Archives* for 1934, part I, page 206; and although the immunity was said to hold in this case, the circumstances do not warrant the drawing of any conclusions as to the question of principle. On the other hand, the preliminary investigations which served as a basis for the law of the 17th June 1938 show that when the law was made there was no doubt as to the validity of the principle as such and this attitude indubitably expresses the time-honored view of Swedish law. The Swedish Government itself claimed immunity in 1929 in connection with legal proceedings instituted in a foreign country and directed against the commercial activities of the Swedish State. It is further of particular significance that the principle is recognized, without exception or at least with few important exceptions, in the majority of countries including the cultural communities near our borders, Germany, France and Great Britain, and also in the United States of America. In view of the great importance of the matter to intercourse between nations, it must only be assumed that Swedish law holds a contrary view on this question of principle if there are entirely cogent reasons for doing so; and such reasons are wholly lacking.

The modifications in the principle of immunity which in recent times have won recognition in differing degrees in different parts of the world have been concerned solely with cases where the conflict in which the foreign State was involved has arisen out of facts which normally relate to the inter-

course of private legal subjects with one another and are then covered by private law. On the other hand, the principle holds good unconditionally if the dispute relates to a situation which derives its character from an act of sovereignty on the part of the foreign State, as, for example, in the case of legal action for the vindication of a claim where the foreign State can justify its possession of the object of the claim on purely public law grounds, so long as these grounds can by their nature be recognized as legally valid within the territory of the country where the proceedings take place. In so far as the principle of immunity constitutes an obstacle in the way of legal action, it must also operate in the same manner in regard to an arrest applied for with a view to safeguarding the outcome of such action. In the present case the applicant for arrest has produced expert evidence to support the thesis that the immunity ought to be deemed less extensive in the matter of the arrest than in the actual legal dispute. This view cannot be admitted. As is shown *inter alia* by the negotiations which resulted in the Brussels Convention of 1926 regarding the rights of state vessels, by Article 7 of the convention and Articles 1 and 2 of the supplementary protocol of the 24th May 1934, and by paragraphs 3 and 4 of the Swedish law of the 17th June 1938 pursuant to the convention, the position is rather that the principle of immunity is particularly strongly upheld in regard to executive measures. As regards arrest in particular, the natural explanation lies in the fact that an arrest can create for the courts of the country where the arrest is made a competence which they would not otherwise enjoy, while, on the other hand, the arrest becomes pointless and must be subsequently discharged if, after the arrest has been imposed by an executive authority, the immunity is recognized as regards the actual legal dispute before the courts.

It does not follow from the above that under Swedish law executive interference with a foreign Power's factual possession of any moveable property is in all circumstances inadmissible, even where the possession can be justified by purely public law grounds. If, for example, possession has been acquired under compulsion, or in a manner involving arbitrary interference with previous possession within Swedish territory, there is no doubt but that the injured party ought to receive legal assistance from the Swedish executive authorities to restore him to possession.

In this case, however, there is no question of this kind of executive interference. The shipowners have not invoked paragraph 191 of the Debtor's Law and asked for legal aid in recovering their former possession of the vessel. Nor, clearly, could they have made such a request with any prospects of success. It is superfluous to consider here whether in general a captain's immediate tenure of a vessel belonging to the owner implies a competence to dispose of his possession thereof so restricted that a transfer of possession effected by him without the owner's consent involves the new possessor in arbitrary action of such a nature as to entitle the owner to claim

the assistance of the executive authorities in restoring possession. In the case under consideration the transfer of possession to the Royal Norwegian Government entailed the carrying into effect of a state process of requisitioning. It follows from the nature of such a process that the carrying into effect can occur even without the collaboration of the owner of the requisitioned object, and this will particularly be the case if the owner is in territory occupied by an enemy State. It is true that the carrying into effect within the territory of another State cannot take place under compulsion and be legally binding. But if, as in the present case, it takes place with the consent of the immediate possessor and especially if the latter is a subject of the requisitioning State and holds the position of captain of the vessel affected by the requisitioning, it can only be regarded as not legally binding on the assumption that the decree on which the execution is based is such that because of its departure from the fundamental principles of the law of our country it ought not to be taken into account. This cannot be said to be the case with the Norwegian requisitioning decree.

The executive measure, therefore, with which the case is primarily concerned is the arrest of the vessel or, more precisely, arrest with the object of ensuring the ultimate execution of a favorable decision in a dispute *in rem* in which the shipowners claim to have the vessel handed over to them as its undoubted owners and to have the right of user which His Britannic Majesty's Government claim to enjoy, disallowed. It is true that in a document submitted to the Court of Appeal in the case the shipowners have stated that they also required the arrest in order to safeguard a claim against His Britannic Majesty's Government for damages on account of their having been prevented from using the vessel. But this request, which has been put forward over the head of the competent first instance, is the less deserving of respect for the fact that there can be no question of arresting, for the purpose of safeguarding a claim, an object belonging to the actual person applying for the arrest.

If the vessel were still in the possession of the Royal Norwegian Government, and if the application for arrest had in consequence been directed against it, the foregoing arguments concerning the validity of the principle of immunity and consideration for the purely public law character of the position in law as between the shipowners and the Royal Norwegian Government would demand that the Government be recognized as immune. The problem to consider is, therefore, how the question of immunity stands with regard to His Britannic Majesty's Government, who are the present possessors of the vessel by virtue of an agreement with the Royal Norwegian Government.

It has been represented in the proceedings in support of the British Government's immunity that a State which has adhered to the Brussels Convention is entitled under Article 7 to make a declaration suspending the convention in time of war as regards restrictions on immunity in relation to

distrain, arrest and other protective measures; that the Royal Norwegian Government availed itself of this facility on the 4th November 1941; that the Swedish Government accordingly issued a circular on the 14th day of the said month; and that His Britannic Majesty's Government, not having ratified the convention, cannot be in a less favorable position than the Royal Norwegian Government thus enjoy. This argument, however, overlooks the fact *inter alia* that the suspended restrictions on immunity are solely those based on the convention, which only covers executive intervention for the purpose of safeguarding a claim, and that in any case the Swedish Government's circular which, under the Law of the 17th June 1938, is of final importance for Swedish law, applies only to execution in the circumstances just mentioned.

There has been much discussion in the case on the question whether the use which His Britannic Majesty's Government is making of the vessel involves such performance of purely state acts that the immunity must be admitted from this point of view. If the determination of the question of immunity depended on an assessment of factors of this kind and if, accordingly, the provisions of the Law of the 17th June 1938, although not directly applicable, were nevertheless to be regarded as capable of providing some guidance, it would be legitimate to ask whether the borderline case which, according to paragraph 5 of the aforesaid law, can give rise to doubt in the mind of the authority adjudicating, does not arise.

Assuming the 1938 law to be applicable by analogy, it is necessary, for immunity to be established, that the vessel be used exclusively for state purposes and not in commerce. The corresponding expression in the convention (on which the Law is based) is "*navires affectes exclusivement a un service gouvernemental et non commercial*," and it was chosen in order to make clear that a State cannot claim immunity if it engages in carriage with no idea of profit but still for a purpose such as providing supplies for the population, which does not entail purely state activity *per se*. His Britannic Majesty's Government has stated—and its statement has not been questioned in the proceedings—that the whole of the cargo intended for the vessel shall be used exclusively by the Government itself for the promotion of the war effort. It is true it has also been stated on behalf of the British Government that the goods, consisting of iron and steel products, are intended to be used not only as war material, but also for "other purposes essential for the conduct of the war" and that the last expression could conceivably give rise to doubt as to whether what is contemplated is a purely state purpose *per se*. But here it should be borne in mind that the statement referred to above as having been made in the course of the negotiations preceding the signature of the convention, *viz.*, that state carriage for the provision of supplies for the population is to be regarded as of a commercial character, carried the reservation that this opinion was valid "at least in peace time." That a State involved in war may, if it engages in carriage for purposes of this kind, be regarded as engaged in a practice of a purely

state character must be considered to have received a certain recognition by virtue of the provisions of Article 7 of the Brussels Convention and paragraph 4 of the Swedish law. All things considered, it seems right to admit that if the 1938 law is applicable by analogy, the decisive factors are in favor of immunity.

However this may be, the clash of interests which gave rise to the application for arrest is anyhow not of a kind to justify restrictions on the right to immunity analogous with those which were given legal sanction under the 1938 law. The present clash of interests is of a different kind from those with which the said law is concerned. It has no connection whatever with the use to which His Britannic Majesty's Government puts the vessel and it is not based on any agreement relating to the vessel as between the parties. The claim of the shipowners is purely a vindictory claim relating to an object which His Britannic Majesty's Government is alleged to possess without lawful title. The fact that the agreement between the two Governments may in any legal situation affecting the latter have to be judged in the light of rules of contract which apply in private intercourse as between private legal subjects does not affect the nature of the legal relationship between the shipowners and His Britannic Majesty's Government. Furthermore this relationship remains one of public law inasmuch as His Britannic Majesty's Government pleads the demise of the vessel from the Royal Norwegian Government which, by virtue of an act of State sovereignty, *viz.*, requisitioning, has appropriated the vessel for use by or on behalf of itself.

In view of the above, it is His Majesty's opinion that His Britannic Majesty's Government as representing a sovereign foreign Power is entitled to immunity in regard to the application for arrest, and His Majesty therefore holds it is in conformity with law to set aside the judgment of the Royal Court of Appeal in so far as appeal has been lodged against the same and to declare that the application for arrest ought not to have been entertained.

Such being the outcome, it is unnecessary to consider whether the Royal Norwegian Government, notwithstanding the fact it has for the time being transferred its right to use the vessel, can plead immunity on the strength of its own interest in the matter. The Royal Norwegian Government has in point of fact appealed for such immunity only in the event of His Britannic Majesty's Government failing to win recognition for its right to immunity.

The appellant is entitled to recover his deposits. All whom the aforesaid may concern shall humbly comply therewith.

Given under His Majesty's Privy Seal

ERIK HAGBERGH

The above is a true copy of the draft judgment kept at Stockholm in the Chancery Division of the Supreme Court.

Witness my hand the 17th March 1942

By authority

J. SETH

SUPREME COURT OF THE UNITED STATES

CASE OF THE GERMAN SABOTEURS

Ex parte Richard Quirin, Herbert Hans Haupt, Edward John Kerlin, Ernest Peter Burger, Heinrich Harm Heinck, Werner Thiel, Herman Otto Neubauer.*

THE UNITED STATES OF AMERICA, *ex rel.* the above Petitioners, *v.* BRIG. GEN. ALBERT L. COX, U. S. A., *Provost Marshal of the Military District of Washington.**

July 31, 1942

PER CURIAM. In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347 (a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the clerk.

The court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

* Nos.—Original and Nos. 1, 2, 3, 4, 5, 6 and 7—July Special Term, 1942.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

October 29, 1942

Enemy aliens, or other persons charged with acts in violation of the law of war, who are subject to the jurisdiction of military tribunals under the President's proclamation, have access to the courts for determining the applicability of the proclamation to the particular case and for the consideration of their contentions that the Constitution and laws of the United States forbid their trial by military commission.

From the very beginning of its history this court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.

Congress, in enacting the Articles of War, has exercised its authority to define and punish offenses against the law of nations and has sanctioned the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. The President, as Commander in Chief, by his proclamation in time of war, has invoked that law. By his order creating the present military commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution gives the Commander in Chief.

By universal agreement and practice the law of war draws a distinction between lawful combatants who are subject upon capture to detention as prisoners of war and unlawful combatants who are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. By the Rules of Land Warfare promulgated by the War Department based upon principles of the common law of war, and by a long course of practical administrative construction by its military authorities, our Government has recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.

The Fifth and Sixth Amendments of the Constitution did not restrict the authority to try offenses against the law of war by military commission, and petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the commission without a jury.

In *Ex parte Milligan*, 4 Wallace 2, the law of war was not applied, and the opinion of the court in that case is therefore inapplicable to the case presented by the present record.

Petitioners' contention that the President's order laying down the procedure to be followed before the military commission is in conflict with the Articles of War does not afford any basis for issuing the writs requested by them.

Leave to file petitions for habeas corpus denied.

Mr. Chief Justice STONE delivered the opinion of the court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this court, and by their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by military commission, appointed by order of the President of July 2, 1942, on charges preferred against them purporting to set out

their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court,—F. Supp.—, petitioners asked leave to file petitions for habeas corpus in this court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this court petitions for certiorari to the Court of Appeals before judgment, pursuant to Section 240 (a) of the Judicial Code, 28 U. S. C. § 347 (a). We granted certiorari before judgment for the reasons which moved us to convene the special term of court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the court, and that the full opinion in the causes would be prepared and filed with the clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins v. Elg*, 307 U. S. 325, 334; *United States ex rel. Rojak v. Marshall*, 34 F. 2d 219; *United States ex rel. Scimeca v. Husband*, 6 F. 2d 957, 958; 8 U. S. C. § 801, and

compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German marine infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German marine infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.¹

¹ From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12-13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16-17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12-13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under

The President, as President and Commander in Chief of the Army and Navy, by order of July 2, 1942,² appointed a military commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the commission. On the same day, by proclamation,³ the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

The proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this court. On July 27, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas cor-

written orders mentioning the purpose of detecting landings. On the night of June 17-18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

² 7 Federal Register 5103.

³ 7 Federal Register 5101.

pus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker v. Johnston*, 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the District Court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan*, 4 Wall. 2, 110-13; *Betts v. Brady*, decided June 1, 1942, pp. 2-4.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's order, in prescribing the procedure of the commission and the method for review of its findings and sentence, and the proceedings of the commission under the order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's proclamation undertakes in terms to deny such access to the class of persons defined by the proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion we have resolved those questions by our conclusion that the commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.⁴ Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra*, 119, 132;

⁴ As appears from the stipulation, a defense offered before the military commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

Tumey v. Ohio, 273 U. S. 510, 535; *Hill v. Texas*, decided June 1, 1942, p. 5. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the armed forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471–1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corre-

sponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the District Courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions or naval courts-martial." 50 U. S. C. § 38.

From the very beginning of its history this court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.⁵ By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our armed forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his proclamation in time of war has invoked that law. By his order creating the present commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to

⁵ *Talbot v. Janson*, 3 Dall. 133, 153, 159-61; *Talbot v. Seeman*, 1 Cranch 1, 40-41; *Maley v. Shattuck*, 3 Cranch 458, 488; *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch 185, 199; *The Rapid*, 8 Cranch 155, 159-64; *The St. Lawrence*, 9 Cranch 120, 122; *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch 191, 197-98; *The Anne*, 3 Wheat. 435, 447-48; *United States v. Reading*, 18 How. 1, 10; *Prize Cases*, 2 Black 635, 666-67, 687; *The Venice*, 2 Wall. 258, 274; *The William Bagaley*, 5 Wall. 377; *Miller v. United States*, 11 Wall. 268; *Coleman v. Tennessee*, 97 U. S. 509, 517; *United States v. Pacific R. R.*, 120 U. S. 227, 233; *Juragua Iron Co. v. United States*, 212 U. S. 297.

seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the court denied the right to proceed by military tribunal in *Ex parte Milligan*, *supra*. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense since it has adopted by reference the sufficiently precise definition of international law. *United States v. Smith*, 5 Wheat. 153; see *The Marianna Flora*, 11 Wheat. 1, 40-41; *United States v. Brig Malek Adhel*, 2 How. 210, 232; *The Ambrose Light*, 25 Fed. 408, 423-28; 18 U. S. C. § 481.⁶ Similarly by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions," Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes v. Hoover*, 20 How. 65, 82), and which may constitutionally be in-

⁶ Compare 28 U. S. C. § 41 (17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606 (b) and 713 (b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

cluded within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations⁷ and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁸ The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, *Military Law*, 2d ed., pp. 1196-97, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, Sections IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,⁹ and during the Mexican and Civil Wars.¹⁰

⁷ Hague Convention No. IV of Oct. 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, *Manual of Military Law* (1929) Ch. xiv, §§ 17-19; German General Staff, *Kriegsbrauch im Landkriege* (1902) Ch. 1; 7 Moore, *Digest of International Law*, § 1109; 2 Hyde, *International Law* (1922) §§ 653-54; 2 Oppenheim, *International Law* (6th ed. 1940) § 107; Bluntschli, *Droit International* (5th ed. tr. Lardy) §§ 531-32; 4 Calvo, *Le Droit International Theorique et Pratique* (5th ed. 1896) §§ 2034-35.

⁸ Great Britain, War Office, *Manual of Military Law*, Ch. xiv, §§ 445-451; *Regolamento di Servizio in Guerra*, § 133, 3 *Leggi e Decreti del Regno d'Italia* (1896) 3184; 7 Moore, *Digest of International Law*, § 1109; 2 Hyde, *International Law*, §§ 654, 652; 2 Halleck, *International Law* (4th ed. 1908) § 4; 2 Oppenheim, *International Law*, § 254; Hall, *International Law*, §§ 127, 135; Baty & Morgan, *War, Its Conduct and Legal Results* (1915) 172; Bluntschli, *Droit International*, §§ 570 bis.

⁹ On Sept. 29, 1780, Major John André, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major André had in his possession papers containing intelligence for the enemy, and reported their conclusion that "Major André . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major André was hanged on Oct. 2, 1780. Proceedings of a Board of General Officers Respecting Major John André, Sept. 29, 1780, printed at Philadelphia in 1780.

¹⁰ During the Mexican War military commissions were created in a large number of in-

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph 84, that "Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."¹¹ These and related provisions have been continued in substance

stances for the trial of various offenses. See General Orders cited in 2 Winthrop, *Military Law* (2d ed. 1896) p. 1298, note 1.

¹¹ During the Civil War the military commission was extensively used for the trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a military commission, for "violations of the laws and usages of civilized war," the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On Jan. 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war." The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the commission was affirmed on the ground that he was both a spy and a "guerrilla," and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On Jan. 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare." He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On Sept. 19, 1865, William Murphy, "a rebel emissary in the employ of and colleague with rebel enemies" was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army," were tried and convicted by military commission for "being secretly within the lines of the United States forces," James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines," Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States," although not "as a spy," Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law

by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369-77; Rules of 1940, Par. 345-57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty although a lesser penalty may be imposed." Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population," and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem." Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals." Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And Paragraph 352 provides that "armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war." As is evident from reading these and related Paragraphs 345-347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the convention declares:

Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems." And by Article 15 of the

of war punished by military commissions during the Civil War see 2 Winthrop, *Military Laws and Precedents* (2d ed. 1896) 1310-11.

See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law¹² that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States."

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-

¹² Great Britain, War Office, *Manual of Military Law* (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes." The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on international law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroying bridges, war materials, communication facilities, etc.; 2 Oppenheim, *International Law* (6th ed. 1940) § 255; Spaight, *Air Power and War Rights* (1924) 283; Spaight, *War Rights on Land* (1911) 110; Phillipson, *International Law and the Great War* (1915) 208; Liszt, *Das Völkerrecht* (12 ed. 1925), § 58 (B) 4; (b) carrying messages secretly: Hall, *International Law* (8th ed. 1924) § 188; Spaight, *War Rights on Land* 215; 3 Merignhac, *Droit Public International* (1912) 296-97; Bluntschli, *Droit International Codifié* (5th ed. tr. Lardy) § 639; 4 Calvo, *Le Droit International Theorique et Pratique* (5th ed. 1896) § 2119; (c) for any hostile purpose: 2 Winthrop, *Military Law and Precedents*, (2nd ed. 1896) 1224. Cf. Lieber, *Guerrilla Parties* (1862), 2 *Miscellaneous Writings* (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

like act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the armed forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the armed forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our armed forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates v. Goodloe*, 101 U. S. 612, 615, 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan v. Devine*, 237 U. S. 632; *Albrecht v. United States*, 273 U. S. 1, 11-12.

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Article III, the Judiciary Article, had provided: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed."

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the judiciary article, *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U. S. 126; cf. *Williams v. United States*, 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia v. Colts*, 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that article. *Callan v. Wilson*, 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick v. United States*, 195 U. S. 65; *District of Columbia v. Clawans*, 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry*, 128 U. S. 289, 302-04; *Savin, Petitioner*, 131 U. S. 267, 277; *In re Debs*, 158 U. S. 564, 594-96; *United States v. Shipp*, 203 U. S. 563, 572; *Blackmer v. United States*, 284 U. S. 421, 440; *Nye v. United States*, 313 U. S. 33, 48; see *United States v. Hudson and Goodwin*, 7 Cranch, 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States v. Zucker*, 161 U. S. 475; *United States v. Regan*, 232 U. S. 37 and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to "crimes"

and "criminal prosecutions." In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra*, 123, 138-39. It is argued that the exception, which excludes from the amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the armed forces of the United States, are not within the exception, the amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces," when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the resolution of the Continental Congress of August 21, 1776,¹³ imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial." This enactment must be regarded as a contemporary construction of both Article III, § 2, and the amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our armed forces. It is a construction of the Constitution which has been followed since the founding of our government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. *Stuart v. Laird*, 1 Cranch 299, 309; *Field v. Clark*, 143 U. S. 649, 691; *United*

¹³ See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107-09.

States v. Curtiss-Wright Corp., 299 U. S. 304, 328. It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.¹⁴

¹⁴ In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John André, Sept. 29, 1780, see note 9 *supra*. (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy" and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a general court martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449-50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a general court martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a division general court martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139-40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a general court martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a general court martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20-21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy, Proceedings of a General Court Martial Convened at the Request of Major General Arnold at the Township of Bedford, Aug. 30-31, 1780 (*Id.* MS No. 31523); he later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial, held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of "M. A." and "D. C.," G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washington, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135, and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged by a general court martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. (National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O-13). William Utley, tried as a spy by a court martial held at Plattsburg, March 3-5, 1814, was acquitted (*Id.*, MS No. X-161). Elijah Clark was convicted as a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5-8, 1812; he was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121-122; Maltby, Treatise on Courts Martial and Military Law (1813), 35-36.

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our armed forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte* Mason, 105 U. S. 696; *Kahn v. Anderson*, 255 U. S. 1, 8–9; cf. *Caldwell v. Parker*, 252 U. S. 376.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our armed forces, it is plain that they present no greater obstacle to the trial in like manner of enemy citizens who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the amendments—whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minnesota L. Rev. 79, 109–11. During the Civil War a number of Confederate officers and soldiers found within the Union lines in disguise were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregor, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission see 2 Winthrop, *Military Law and Precedents*, 1193 *et seq.*

with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this court in the *Milligan* case, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Elsewhere in its opinion, at pp. 118, 121-22 and 131, the court was at pains to point out that *Milligan*, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the court's statement as to the inapplicability of the law of war to *Milligan's* case as having particular reference to the facts before it. From them the court concluded that *Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally v. Hill*, 293 U. S. 131.

There remains the contention that the President's order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the commission and on the review of its findings and sentence, and the procedure in fact followed by the commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaghry v. Deming*, 186 U. S. 49; *United States v. Brown*, 206 U. S. 240, 244; *Runkle v. United States*, 122 U. S. 543, 555-56; *Dynes v. Hoover*, 20 How. 65, 80-81); that the President's order prescribes

such an unlawful procedure; and that the secrecy surrounding the trial and all proceedings before the commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the procedure by which the trial is to be conducted; and that since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full court are not agreed on the appropriate grounds for decision. Some members of the court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to “commissions”—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the military commission, alleged an offense which the President is authorized to order tried by military commission; that his order convening the commission was a lawful order and that the commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this court should be denied.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

BOOK REVIEWS AND NOTES

The Public Papers and Addresses of Franklin D. Roosevelt. Compiled by Samuel I. Rosenman, with a special introduction and explanatory notes by President Roosevelt. New York: Macmillan Co., 1941. 4 vols. Indexes. \$30.00.

In 1938 the compiler of this work published five volumes which contained the papers of Franklin D. Roosevelt issued during his two terms as Governor of New York, 1929-1933, and also during his first term as President of the United States—from March 4, 1933, to January 19, 1937. He has now compiled the papers for the President's second term, one volume being devoted to each of four periods and having its own title: 1937—The Constitution Prevails; 1938—The Continuing Struggle for Liberalism; 1939—War and Neutrality; 1940—War and Aid to Democracies. The last volume closes at the date January 16, 1941. Mr. Rosenman had had the distinct advantage of being approved and practically appointed by the President to undertake this important task for which he was so peculiarly fitted by his experience as Counsel to the Governor of New York for both terms and by his continuing and intimate relations with Mr. Roosevelt after the latter became President.

The physical features of these four large volumes, which make a total bulk of well over 3,000 pages, are admirable. They are strongly and attractively bound in soft stone blue and the type is unusually clearcut and well spaced. Every paper is numbered, each volume having its own separate series. At the beginning of Volume I is included a striking feature—a table which lists alphabetically for all four volumes a number of topics, including Agriculture, Banking, Civilian Conservation Corps, Courts and Constitution, Democratic Party, Education, Foreign Affairs (European Relations, Pan American Affairs, Far Eastern Relations, Foreign Trade, Neutrality, etc.), Health, Hours and Wages, Insular Possessions, National Defense, Reorganization of Executive Branch of Government, Social Security, etc. These listings give page references in each of the four volumes in order that the reader may follow through at a glance. Immediately after these reference groupings is a long alphabetical list of smaller topics by each of which is set down the larger topic under which it may be found. Hence there is for the student a preliminary, comprehensive index to supplement the index placed at the end of each volume. Especially useful in Volume I is a complete list of "Proclamations and Executive Orders" with numbers and exact dates as found in the United States Statutes at Large for the 75th and 76th Congresses, *i.e.*, from January, 1937, to January, 1941.

Particularly vivid and instructive are the notes appended to numerous papers by Mr. Rosenman and in some cases by President Roosevelt himself. They give a volume of information and carry on, sometimes to a conclusion,

the story begun by the paper itself. Thus there is in fact a sort of connected narrative between the papers and even the volumes. In these notes comment is limited almost entirely to fact, very little opinion being expressed. As to the selection of contents, no attempt was made to include all papers, and the selection is apparently objective and fair. In length, the items range all the way from a brief paragraph or so to long and detailed statements which fill many pages. Most valuable and vividly interesting is the introduction written for each volume by the President himself. His introduction to Volume I (1937) gives his own story of the fight for the reform of the federal judicial system, proper emphasis being placed on the proposed reform of the lower and intermediate courts, although the public was apparently more interested in the dramatic fight over the Supreme Court. These introductions give the story of many of his political aspirations and struggles over four years of critical and stormy politics at home and abroad.

Among the papers, the speeches are most significant, the most important, of course, being those addressed to Congress. These speeches contain a mass of information concerning executive acts and the reasons therefor, as, for example, those which support the policy of exchanging over-age destroyers for bits of British territory in the Western Hemisphere where naval and air bases could be established by the United States. There are progress reports on all sorts and sizes of federal enterprises. A number of speeches are made for the encouragement of various undertakings in the amelioration of human suffering. Speeches over the radio—those famous fireside chats—deal with every possible topic on imminent problems, domestic and foreign, and throw a light on our international affairs which could come from no other source. They will be for all present and future students of American foreign policy a source of priceless information from a period of global war and reconstruction.

An ordered reading of the various declarations or proclamations of neutrality beginning in 1939 will save confusion. The declarations distinguish carefully between neutrality under general international law and that under our domestic "laws of neutrality" which are not neutrality laws at all. Immediately following the proclamations under both headings are the innumerable executive orders necessary to implement the law.

Of outstanding value are the numberless press conferences (about 370) in dialogue form—the familiar chatty exchanges between the President and press representatives. These chats cover a multitude of topics which could not be touched upon anywhere else.

In this collection of papers is reflected a breadth and vitality of interest in men and movements befitting the head of a great democratic republic. There is indicated also a power of continuous growth and change which—according to the views of a particular reader—may be for better or for worse. In no single field, with possibly one or two exceptions, is this more apparent than in the field of diplomatic relations. These four books will be a source

of instruction and inspiration to countless students in our own and foreign lands. We hope that Mr. Rosenman may begin before long the collecting and editing of the papers of President Roosevelt's third term.

BESSIE C. RANDOLPH

A Study of War. By Quincy Wright. Chicago: University of Chicago Press, 1942. 2 vols. \$15.

This monumental work was begun in 1926, under the auspices of the Social Science Research Council at the University of Chicago. Sixty-six persons (listed in the first appendix) prepared studies in connection with it. It is conceived on so enormous a scale and covers so many approaches to the subject of war that this reviewer finds it impossible, within the limits of a review, even to give an adequate description of it, much less a critical evaluation. Indeed, it would require experts in many fields—anthropology, sociology, psychology, science, mathematics, as well as military, political and legal science—properly to evaluate it. Professor Wright uses all the tools of scientific knowledge, pausing frequently to explain to the reader how they are used.

The first volume contains 405 pages of text and 24 appendices covering 273 pages more; the second volume has 671 pages of text and 20 appendices requiring 200 more pages. Many of these appendices can be regarded as extensions of the text. There are also 51 illustrations (charts) and 77 tables. To exemplify the scope and detail of the work, there are to be found among the charts titles such as Population Density of the World, Centers of Origins of Cultivated Plants, Winter and Summer Average Temperatures, Fluctuations in the Main Systems of Thought, Rise of Secular and Decline of Religious Art in Europe, Relative Psychic Distances between the Great Powers, Probability of War between Pairs of States. Among the subjects of the tables are Characteristics of Primitive Peoples, Relation between Warlikeness and Continents (and temperature, and climate, and natural habitat, and race, and political or social organization), Increase and Rate of Increase of the World's Population, Duration of Battles, Number of Soldiers Engaged in Battles, Typical Characteristics of War in the Successive Stages of Civilization.

War, says Professor Wright, has become more of a problem because of a shrinking world, the acceleration of history, military inventions, and the rise of democracy. Volume I is devoted to the history of war, from animal warfare to that of present times. For this part of the study, war is defined (p. 8) as "a *violent contact of distinct but similar entities.*" Historically, war has gone through four stages in the "organic history which began perhaps a billion years ago" (p. 29): (1) prehuman, (2) primitive war, (3) the historic stage in the valleys of the Nile and Euphrates, (4) world contact, beginning with printing and wider travel. Within each civilization, wars become less frequent and more destructive, but no persistent trend can be shown toward

either pacifism or militarism. War has become more intense, more extended, and more costly, and less functional, less intentional, less directable and less legal (p. 248). Chapters X to XV deal with the functions, drives, techniques, theories, and changes in war. War "has made for instability, for disintegration, for despotism and for unadaptability" (p. 272). The author does not regard the economic drive as the chief cause of war, and asserts that only appeals to ideals (rather than to self-interest) can create the sacrificial spirit needed to fight modern war. The techniques of modern war are discussed in Chapter XIII from a military viewpoint. The chapter on the Theories of Modern War is more nearly a chapter on international law which, he says, must be dynamic and more than merely a description of the behavior of states. Changes in war have made it more destructive and more useful to despots; it occurs less often but is more severe; it leads to economic disorganization. Defense has been improved, and this means wars of attrition. The balance of power system leads to polarization around powerful groups, and has increasingly failed.

Volume II begins with an analysis of war intended for scientific understanding. Are there laws which will enable students to predict the incidence and manifestations of wars, through examination of the characteristics of nations? For this purpose another definition of war is provided (p. 698): "War may therefore be regarded from the standpoint of each belligerent as an extreme intensification of military activity, psychological tension, legal power, and social integration. From the standpoint of all belligerents war may be considered a simultaneous conflict of armed forces, popular feelings, jural dogmas, and national cultures so nearly equal as to lead to an extreme intensification of each." It is a recognized situation, influenced by recognized characteristics, and to be differentiated from other exceptional legal situations, such as martial law, or sanctions. None of the social disciplines have taken a definite position as to war. It is a social invention, and those who are in conflict without understanding certain social concepts do not make war. The causes of war are "politico-technological, juro-ideological, socio-religious, and psycho-economic" (p. 739). These four points of view emphasize respectively the technique, the law, the functions and the drive of war, and the discussion in the following chapters conforms to this classification.

The rise of nationalism, of constitutionalism, of democracy, and of international organization have upset the assumptions upon which the balance of power has long operated. International law tends to convert the system of balance of power into a system of collective security (p. 765). Chapter XXII contains an interesting discussion of democracy and war: Professor Wright thinks that peace produces democracy rather than democracy peace. The function of law is to produce peace—a condition "in which order and justice prevail." So long as States may legally put force above law, it is not surprising that international law does not command confidence. It was British

seapower, rather than international law, which kept order during the 19th century (p. 923). It is hard to organize political power in a society not faced by external opposition; for this reason, nationalism is strong. Sovereignty, however, is not incompatible with the elimination of international violence. Chapter XXIX considers International Organization and War, in a compact statement. Peace is not merely the absence of war; it is a positive concept, and a peace which tolerates breaches of peace destroys itself (pp. 1090-1091). Economists reject the theory that the struggle for resources produces war; what needs to be considered is rather the influence of various productive systems on war. Capitalism has been historically peaceful (p. 1162), while socialism tends toward war (p. 1172). The subordination of capitalism to nationalism and its failure to solve depressions suggest that what is needed is a reform of capitalism rather than substitution of a new form of economy (p. 1196).

Several chapters discuss the factors influencing the incidence of war; there is even a mathematical formula for calculating the probability of war (p. 1272) which seems to have worked fairly well for this war (p. 1282). War is not due to any single cause but rather to an equilibrium of many forces. To avoid war, cultures must be adjusted to changing world conditions.

The last part of the book is devoted to the control of war. The author has earlier said (p. 21) that his purpose is not to induce an attitude toward war in his readers but "rather to state what war has been in the past, what it is in the present, and what it may be in the future." He does not, therefore, allot many pages to the control of war. The positive aspect of peace, which is justice, cannot be separated from its negative aspect, which is the elimination of violence. The attack on war must be from several fronts, educational, social, legal, political. International solidarity today lags behind technological interdependence.

Professor Wright's study is a cautious one, revealing what a complex thing is the institution of war. He does not, however, hesitate to utter his beliefs. He leans toward a federal world organization; he favors international planning and regulation in the economic field, but thinks that the competitive system will work best, granted such regulation. He is strongly in favor of recognition of the individual as a subject of international law and government, and over and over again (*e.g.*, pp. 952, 981) asserts that the success of any international government will depend upon its ability to reach beyond the sovereign State to the individual human being.

The most impressive thing about this book is its vast scope and scientific method. The 1,552 pages does not reveal its scope, for it is closely written, and tables and appendices reveal the amount of investigation made. There is no bibliography—to list the books cited in footnotes would have required another volume—but there is an index of names and an index of subjects. These two volumes will not be popular reading, but they will be invaluable to social scientists, from many angles. The studies upon which so many are

now engaged, concerning the future organization of peace, will refer often to this work. It may daunt the reader when he first starts into it, but he will find that the style and organization is excellent, and that he has an inexhaustible supply of information before him. CLYDE EAGLETON

Treaties and other International Acts of the United States of America. Edited by Hunter Miller. Vol. 6, Documents 152-172; 1852-1855. Washington: Government Printing Office, 1942. pp. xxx, 886. \$3.25.

Appreciation of this magistral collection has been expressed in previous numbers of this JOURNAL as the earlier volumes were published.¹ The high standard has been maintained in this sixth volume which covers the period from 1852 to 1855, and which includes 21 United States treaties or acts of those years with Prussia, Uruguay, Peru, The Netherlands, Ecuador, Great Britain, France, Venezuela, Argentina, Bavaria, Mexico, Japan, Loochoo, Russia, Lagos, Brunswick, Two Sicilies, and Hanover. Most important, perhaps, are the original treaty with Japan of 1854 (to which 228 pages are devoted) and the treaty with Great Britain of 1854 (to which 76 pages are devoted). The "Documents" selected for inclusion are of unequal status, ranging from treaties of which ratifications are exchanged to highly informal agreements for the settlement of claims; Document 169 is an engagement of the King and Chiefs of Lagos, undertaken in response to a request by a U. S. Naval commander. In addition to the detailed account of each instrument, the history of the execution of its provisions is traced, so that in some cases the volume becomes a most useful survey of history hitherto obscure. This is particularly notable in the case of Document 157, the 1853 Claims Convention with Great Britain.

The usefulness of this collection is a sufficient reason for one's wishing to look forward to its completion. The plan announced in 1931² called for the inclusion of the treaties and acts down to December 31, 1930. Yet this volume, which appears after the lapse of eleven years, brings the collection down only to 1855. This was before the period of great activity in the making of American treaties began; of the 838 treaties included in the United States Treaty Series down to the end of 1930, less than one-sixth antedated 1855.³ It is also apparent from a comparison of the contents of Volumes V and VI with the "list of documents" published in Volume I⁴, that the editor is discovering a number of treaties or acts not appearing in his original list. The task looms larger as the work proceeds, and it can not be hurried; the time consumed is a guarantee of thoroughness and completeness. Yet on present lines the inclusions are very extensive, and it might be thought that the collection would hardly suffer in usefulness if such claims settlements as those presented in Documents 153 and 154 were omitted.

MANLEY O. HUDSON

¹ Vol. 25 (1932), p. 439; Vol. 28 (1934), p. 626; Vol. 29 (1935), p. 562; Vol. 32 (1938), p. 402.

² Vol. I of the collection, pp. v, 95.

³ *Ibid.*, pp. 100-135.

⁴ Pp. 55-95.

American Regulation of Arms Exports. By Elton Atwater. Washington: Carnegie Endowment for International Peace, 1941. pp. 287. Index. \$2.00.

This timely volume, with a foreword by Philip C. Jessup, Director of the Division of International Law of the Endowment, which published it as No. 4 in its series of monographs, is a study of the considerable experience of the United States in the regulation of arms exports since the first attempt to carry out such policy in 1793, and the more frequent attempts since 1905, down to the present time. It appears that no effort has heretofore been made "to examine in detail this previous experience and to relate it to the present problems of arms exports regulation." The effort is, therefore, made to bring together and coördinate the vast amount of material bearing on this experience of the United States, including the circumstances which led to the adoption of the various embargoes, the diplomatic background against which they were applied and the difficulties encountered in their administration.

The study falls naturally under three heads: First, the non-regulation of private exports of arms from 1793 to 1917, except in time of war or threat of war. This section begins with the historic pronouncement of Jefferson that "our citizens have always been free to make, vend, and export arms," and covers the reiteration of the policy from 1814 to 1914 and during the last war. Second, the regulation of arms exports to promote stability and discourage revolution in Latin America and China, beginning inconspicuously in 1905 and more openly in 1912. This section—the largest of the book—covers in detail the history of the application of the policy to the Dominican Republic, Mexico, China, Cuba, Honduras and Nicaragua, and Brazil. Third, the regulation of arms exports to discourage foreign wars or to keep the United States out of war, between 1934 and 1939. This part deals with the relation and application of the policy to international conflicts. Interest in this phase began with the signature by the United States of the Convention of Saint Germain of September 10, 1919, providing for the general regulation of the international arms traffic. This convention, however, was never ratified. While interest in the policy was growing in the United States, it was not translated into action until 1934–1935. The limited Chaco embargo of 1934 and the investigations of the Nye Committee led to the so-called Neutrality Act of 1935 and the arms export licensing system. From then on to the entry of the United States in the present war the matter of arms exports was of foremost importance in the conduct of American foreign policy.

The careful documentation indicates how thoroughly the whole field has been covered by the author.

L. H. WOOLSEY

Papers Relating to the Foreign Relations of the United States, 1927. Washington: Government Printing Office, 1942. Vol. I, pp. lxxxi, 565, \$1.50; Vol. II, pp. cvi, 841, \$2.00; Vol. III, pp. xcvii, 885, \$2.00. Indexes.

In his annual message to Congress in 1927, President Coolidge said that a

"comfortable prosperity" would continue if the people maintained that confidence which they were entitled to have. The foreign relations for that year, now illuminated by these carefully prepared volumes, comprised developments which seem even farther removed from the present than the fifteen-year "gap" indicates. More impressive than the chief executive's surmise concerning prosperity was the President's declaration that "wherever our flag goes, the rights of humanity increase." Relations with countries in which there was civil strife and disorder receive much emphasis. Matters relating to China, for example, take up nearly 500 pages, those with Nicaragua nearly 200. For "Japan" there is only a cross reference to the section (in the material relating to China) on consideration of a loan by American bankers to the South Manchuria Railway. There is, however, in connection with the three-Power conference at Geneva on limitation of naval armament, an extended record of efforts looking to agreement with Japan and Great Britain.

Students of American foreign policy in general will probably find of considerable interest what these volumes contain on such matters as armament limitation, the rôle which the United States accepted in the internal affairs of certain States in the Western Hemisphere, the Anglo-American agreement on World War claims which was effected not as a "financial settlement" but as a "friendly composition of conflicting points of view" (II, 753-4), the position of the Secretary of the Treasury with respect to cancellation of war debts (II, 738), disapproval by the United States of the establishment of a Permanent Court of American Justice (I, 267), and the exchange of views which were to culminate in the Kellogg-Briand Pact. The specialist in international law should find of value materials on such matters as the privileges and immunities in the United States of foreign diplomatic agents, consular officers, and representatives of a public international organization (I, 414-417, III, 248-252, 756), meanings of traditional reserve clauses in arbitration treaties (II, 628), expulsion of aliens in connection with the rule of local remedies (III, 257, 259, 262, 266), and the effect upon preëxisting American rights of a monopoly established by a foreign State (III, 694).

To the reviewer it seems especially desirable to have the type of editorial note which the State Department's Division of Research and Publication has helpfully provided (as at p. 284 of Volume III) to give in brief the sequel to developments recorded in the official correspondence.

ROBERT R. WILSON

Confiscation (Soviet), Aggression (German), and Foreign-Funds Control in American Law. By Barnett Hollander. New York: Baker, Voorhis & Co., 1942. pp. xiv, 265. Index. \$3.50.

The author of this book is an American lawyer who practices largely in London. In preparation for a paper which was to be read before the Grotius Society he gathered together the American cases dealing with the effect

given in the United States (a) to the Soviet confiscatory decrees, and (b) to the German confiscatory and spoliative measures against disfavored persons and interests in Germany and in the occupied territories, and with the defenses set up by American courts and legislation against the application and enforcement of these measures in the United States. Among these are the Executive Orders for foreign funds control, beginning April 10, 1940. The Introduction is dated March 1, 1942, and concedes that the entrance of the United States into the war has made the book partly of historical interest only. Since it was prepared to a considerable extent for English lawyers, the footnotes reprint copiously opinions delivered in American cases.

The author probably lays no claim to having made a profound contribution to scholarship. The second part, dealing with German impairment of property rights, will, however, be useful to students interested in tracing the measures taken in the United States to prevent American funds from reaching the German Government. The first part, dealing with the effect given in the United States to Soviet decrees, adds little to our previous knowledge, for the American cases have been dealt with in numerous scholarly articles. With the exception of *United States v. Pink*, 315 U. S. 203, the cases, mainly in New York and the federal courts, are presented largely without critical analysis. The author might have shown the progression in New York from a refusal to give effect to Soviet decrees on the erroneous ground that the Soviets were not recognized, to the position that effect would be given only if public policy so required, to the final correct position that no effect would be given to the decrees before or after recognition if they dealt with property always in the United States, since confiscation was in this case ineffective and also contrary to New York public policy. Then came the Supreme Court in *United States v. Pink* and jumbled up the law by "discovering," contrary to contemporaneous authority, that the Soviets did or could successfully confiscate property located in New York, apparently under the condition that the United States became the beneficiary by assignment—but *semble* (*Bollack v. Société Generale*, 263 App. Div. (N. Y.) 601) not otherwise. The author joins other commentators in challenging the premises of the decision and demonstrates that the Soviet Government made no claim to extraterritorial confiscations until the Minister of Justice in 1937 was apparently persuaded by a United States Department of Justice inquiry for the first time to suggest it. The author might have criticized the erroneous remark—applied to a successful revolution only—in *Oetjen v. Central Leather Co.*, 246 U. S. 297, that recognition "validates" a past confiscation, a misstatement which misled the court in subsequent cases. "Authenticates" or "officializes" was doubtless what Justice Clarke meant. The Executive Orders and Regulations relating to foreign funds control are a useful compendium of information for the practitioner, though the author takes up little of the administrative practice. For example, rulings on particular applications for licenses, especially when refused, are devoid of any statement of the grounds. No attention is given to the growing effort ad-

ministratively to guide the courts in their decisions of cases concerning the "freezing" of property here by friendly exiled governments.

EDWIN BORCHARD

The International Economic Law of Belligerent Occupation. By Ernst H. Feilchenfeld. Monograph Series of the Carnegie Endowment for International Peace, Division of International Law, No. 6. Washington: 1942. pp. xii, 181. Index. \$1.50.

Briefly and tersely a competent scholar here offers the fruits of a fresh and penetrating study of some phases of the law of belligerent occupation, and concerning many problems which have generally escaped attention or comment. He pays due heed to the applicable Regulations annexed to the Hague Convention of 1907 respecting the Laws and Customs of War on Land, to judicial interpretations of them, and to the United States Army Rules of Land Warfare. Inasmuch as any occupation of foreign territory by a State engaged in war is a belligerent occupation, regardless of the method by which such an achievement is wrought, one may question the clearness of the statement that "an armistice occupation is, however, not necessarily a later phase of belligerent occupation; under an armistice agreement, or during the period of an armistice, territory not previously overrun may become an object of occupation" (p. 6).

In Sections 488-502 the author gives helpful discussion of the problem as to the extent of the freedom of a restored territorial sovereign to ignore the consequences of what the occupant lawfully accomplished while in control of the occupied area. In Sections 277-288, he portrays the action of Germany with respect to money and currency in Belgium, 1914-1917, as possibly illustrative of belligerent excesses revealing the occupant as utilizing its powers as temporary controller for purposes of self-enrichment. His treatment in Sections 357-370 of the history of German handling of central banks within occupied areas of France and Germany in World War I is of interest. The matter of Public Finance (Chap. III), Regulation and Organization (Chap. IV), and Relations between Jurisdictions (Chap. VI), are replete with fresh discussions.

The author too modestly states in his preface that because of the "limited time available" for the preparation of his work, "it has not been possible to achieve peacetime academic standards in a new research." If his helpful book be the product of a "rush job," one wonders what Dr. Feilchenfeld may be expected to turn out when ultimately and without haste he essays to cover the whole field of belligerent occupation.

CHARLES CHENEY HYDE

The United Nations on the Way. Principles and Policies. By Henri Bonnet. Chicago: World Citizens Association, 1942. pp. ix, 170. Index. 50¢.

In a previous publication entitled *The United Nations—What They Are—What They May Become*, the distinguished Director of the International

Institute of Intellectual Coöperation, M. Henri Bonnet—the author of the volume now under review—discussed the existing means of coöperation amongst the members of the United Nations and made suggestions for the realization of the concept of the United Nations. In the present volume he goes into the policies outlined and expressed by the United Nations in various fields of their international relationship. The author studies the treaties and agreements between members of the United Nations and statements by responsible leaders.

In Chapter I he deals with the Four Freedoms, the Atlantic Charter, self-government, and Wilson's Fourteen Points. Chapters II, III, and IV are devoted to the United Nations as they are related to Europe, Asia, and Latin America. In Chapter V there is a review of the economic and financial policy of the United Nations, while Chapter VI is concerned with social problems. In Chapter VII, the final chapter, the author gives us his most creative thought. Discussing "New Demands" and "New Measures," he urges immediate real organization by the thirty United Nations. Besides the advantages of such tangible organization in centralizing the strategy and the conduct of the war, it would be specially desirable in laying the foundations for world organization for peace. He would have a "Political Council," an "Economic and Financial Council," and later an International Bank and an International Stabilization Fund. There should be also a "United Nations Relief Agency."

There are handy documents in the Appendices such as the Polish-Czechoslovakian agreement, the Greek-Yugoslav agreement, the Russian-Polish agreements, the Anglo-Russian treaty, the Cripps proposals, the resolutions of the International Labor Conference on Postwar Reconstruction, and the Aims and Organization of the World Citizens Association.

This volume is one of the most useful that has appeared with regard to the United Nations. It is thoughtful and scholarly; it should serve to clarify thought as to future possibilities of utilization of the war momentum achieved by the United Nations for the purpose of the postwar international organization.

J. EUGENE HARLEY

Victory Is Not Enough. The Strategy for a Lasting Peace. By Egon Ranshofen-Wertheimer. New York: W. W. Norton & Co., 1942. pp. 322. Index. \$3.00.

As the war progresses into its fourth year the hour of victory is drawing closer. What are we to do by way of laying the foundations for an enduring peace? Many—some of us are inclined to think, too many—have tried to answer this crucial question in writings and speeches. Mr. Ranshofen-Wertheimer is not one of the "too many." While he is neither a skeptic nor one who accepts things fatalistically as they come along, there prevails throughout his discussions a sound political realism derived from first-hand knowledge of the manifold sociological and psychological factors that were

instrumental in bringing about the present stage of world affairs. From the fact that the mistakes we made in 1919 are fully realized it does not follow that we will avoid other, equally fateful, mistakes in future peacemaking.

Cessation of hostilities is not identical with peace. Nor is it the peace treaty which makes peace a living reality. The author warns us to be prepared for "a prolonged period of insecurity" during which "not disarmament, but watchfulness, will be the password" (pp. 310, 313). Peace, in the words of the author, "is not the natural state of mankind but its most ambitious endeavor," and it cannot be achieved without major sacrifices: "Not only war—peace too is impossible without tears" (p. 307). He does not believe that, for many years to come, States and nations (or what will be left of them at the termination of the war) will be ready for the establishment of a world-wide organization under international law. Rather he thinks that "the peace of the world will once more rest openly upon the balance of power" (p. 290). So far as postwar Europe is concerned, the author visualizes "a loose unit in which the whole military power of the Continent is pooled into a Confederation" (p. 266). Here again he cautions us against taking too much for granted. The spirit of aggressiveness characteristic of Nazi Germany will not collapse on the day of final military defeat. In this connection the author outlines a detailed plan of moral and intellectual reëducation of the Germans with a view to diverting the German energies into peaceful endeavors.

This is a challenging book worthy of thoughtful reading. Readers may disagree with some of the basic views expressed by the author, but no one will deny him exceptional keenness of factual observation and political judgment, and, moreover, utmost sincerity in pleading his case.

GERHART HUSSERL

The Coming Age of World Control. The Transition to an Organized World Society. By Nicholas Doman. New York and London: Harper & Bros., 1942. pp. x, 301. Index. \$3.00.

This volume by a young scholar of Hungarian origin and mixed European-American scientific training, is by a long way the most vigorous and best-reasoned plea for a universal political order that has been published to date. The author is of the opinion that the world of tomorrow will be faced by two alternatives, first, the choice between anarchy and global organization, and subsequently, should it choose the latter course, between a hybrid totalitarian universalism and a democratic supernational, world-wide government. "The logical form of the political structure of this century," he states, "is a political universal organization: either a world empire or a federation, a commonwealth or a combination of these" (p. 30). Dr. Doman, no doubt, has his preference regarding the concrete shape of the world organization he envisages. He abstains, however, from any close examination of the institutional aspect of the new order he so ardently advocates.

He is that rare phenomenon among advocates of an all-comprehensive system: a planner who is not an institutionalist.

The book abounds in original and challenging remarks and observations. It reflects a vast erudition and an admirable familiarity with unusual and out-of-the-way source material. Apart from English and American publications, accessible but rarely used by American scholars specialized in world affairs, Dr. Doman has drawn from French and German authors as far apart as Condorcet and Benjamin Constant, on the one hand, and, on the other, Konstantin Frantz, a 19th century anti-Bismarkian German federalist, unduly neglected even by European scholars, and Ernst Jünger, an interesting precursor of National Socialism. While contributing to the interest of the book, the author's inclination to quote from an impressive array of unfamiliar sources frequently becomes detrimental. At times his statements come dangerously close to clever paradoxes.

The chief merit of Dr. Doman's work lies in the attempt, partly successful, to steer the contemporary discussion of the shape of the future out of the shallow waters of technical analogies and superficial optimism which permeate so much of the writing on this topic. In this respect he can be greeted as one among a small number of valiant pioneers who have not yet been accorded appropriate consideration on the part of the recognized authorities in this field. The author is aware of the kind of criticism to which his *Coming Age of World Control* is exposed on the part of the unconverted, for he points out that "most blueprints on the new world order lay themselves open to the charge of lack of realism, for they fail to emphasize the inevitable conflicts their suggestions entail" (p. 270). Dr. Doman has not entirely escaped the pitfall thus described by himself. He has conscientiously sketched some of the dangers, but he makes light of the arguments and obstacles blocking the realization of that ideal. His book is a thought-provoking, very sincere attempt to prepare the intellectual ground for the age of world control. It succeeds in giving a new stimulus to the current discussion. It fails in convincing the reader that his supernational empire or commonwealth is not only desirable and logically unassailable but also feasible. Rationalist that he is, the author cannot fully recognize that the laws of political logic are not those of pure reason in the Kantian sense.

EGON RANSHOFEN-WERTHEIMER

Nazi Conquest of Danzig. By Hans L. Leonhardt. Chicago: University of Chicago Press, 1942. pp. xvi, 363. Index. \$3.50.

Although written, as the author himself points out, under the handicap of war conditions, when many sources are not yet available, the book is a useful and informative one. Future historians of the period will possess a wealth of information which a contemporary writer, even under normal circumstances, does not command. Yet it is useful that he may also have at hand the testimony of honest witnesses. That Mr. Leonhardt was actively en-

gaged in the struggle dealt with in his book does not, to my mind, detract from the value of his evidence. The book, however, is apt to be misleading on account of a lack, not so much of detachment as of perspective in the vision of the author. "The League failed in its task," says Professor Quincy Wright in his foreword, and this is the conclusion that the reader who is not thoroughly familiar with the subject will be tempted to draw. Mr. Leonhardt himself says in his preface: "The special interrelationship between the process of nazification and the attitude of the League will be the prime object of this study. The action of the League Powers will, however, be dealt with only in so far as their policies have a direct bearing on the internal issues in the City of Danzig." One cannot thus focus on internal issues and leave the rest of the picture in semi-obscurity, without distorting the mental image. These issues were, of course, vital to the Danzig democrats. They were of great importance to the democratic cause in Germany. They are of interest to the student of international organization whose approach to the problem of the guaranty of individual rights is an experimental one, for they show the danger of declaring and guarantying individual rights without providing adequate judicial and executive machinery for their determination and their enforcement. From a broader standpoint, however, that of a general appraisal of what Viscount Cecil has called the "Great Experiment," it is essential to realize why and how these internal issues came before the international forum at Geneva.

Danzig had not been detached from Germany in the interest of Europe, but exclusively in that of Poland, for the purpose of combining the free access of that country to the Baltic Sea with the safeguard of the national character of the inhabitants, Germans in their overwhelming majority, at a time when it was believed on all sides that its port would always remain Poland's "only lung." The guaranty by the League of Nations of the Danzig Constitution was part of a system which aimed at safeguarding Poland's rights against German interference and the inhabitants against Polish intervention beyond Poland's treaty rights. Internationally, there were no minority rights in Germany. Had Danzig remained inside the Reich, its democratic parties could no more have petitioned the Council than those of Berlin. Hitler and Pilsudski had come to terms, and Poland throughout failed to espouse the cause of the Danzig democrats. In nevertheless attempting to shield them, the High Commissioner and the Council may not have exceeded their international right; they certainly exceeded their strict international duty.

Concerning, in particular, the decisive turning point in the events, the wish of the democratic parties for new elections to be ordered by the Council in January, 1936, Mr. Leonhardt recounts how they presented their case in London: "Fair elections . . . could be guaranteed only by the presence of an international police force" (p. 193). How could the Council have taken such a step, requested neither by Danzig nor by Poland? It would be unstatesmanlike and unfair to find here a case of appeasement, *i.e.*, of acquiescence

in international lawlessness with the hope of securing the maintenance of peace. Only a few weeks later, however, on March 2, 1936, M. Flandin, for France—Mr. Eden, for Great Britain, expressly not concurring—took an attitude which unavoidably resulted in the oil sanctions against Italy being indefinitely postponed. On March 7, 1936, the first Nazi act of aggression, the invasion of the demilitarized zone along the Rhine, took place. The time for useful action at Danzig was past. The world drama had begun. By safeguarding the national interest of Poland, as he saw it, at the expense of the prestige of the League of Nations, Colonel Beck played the leading part in the Danzig curtain-raiser that preceded it.

These are the fundamental legal and political data that one should keep in mind when reading *Nazi Conquest of Danzig*, a book that will prove singularly helpful to those who wish to add to their understanding of the psychological causes of the present war.

JAN HOSTIE.

Geopolitik. Doctrine of National Self-Sufficiency and Empire. By Johannes Mattern. Baltimore: Johns Hopkins Press, 1942. pp. 139. Index. Cloth, \$2.00; paper, \$1.50.

In this little book the author has no ambition to exhaust his subject-matter. All he tries to do is to bring clarity into this matter of geopolitics, which, until recently, has been little known in this country, whereas recently, in consequence of the political application of this doctrine to the pattern of German conquests, much nonsense has been written about it. His first goal is to show that geopolitics is, by no means, a German monopoly, nor an entirely new invention. In a looser sense, it is only a new name for age-old devices of imperial expansion, conquests, for the "place in the sun," "manifest destiny" and "carrying the white man's burden." Admiral Mahan's writings are geopolitics in this sense, as is Clarence K. Streit's *Union Now*. But as "a formally proclaimed school of thought," Geopolitik is new, but has a large ancestry. It stems from the expansion of geography. But whereas political geography as developed by Humboldt and Ritter is a genuine, analytical science, it becomes politics, geopolitics, by setting up, on geographical bases, normative rules for the conduct of leaders of States, and by teaching means of procedure for the successful application of these normative rules. This decisive step from genuine science to naked Realpolitik, power politics, was taken by Reclus and Ratzel, who introduced the famous "Raummotiv."

The real founder of geopolitics, however, is the Swede Rudolf Kjellén, who merged political geography with political science into his new "realistic" quasi-science of the State; his work is critically examined in detail. Kjellén's foremost disciple is Karl Haushofer, the dictator of the German Institute of Geopolitics at Munich and Editor of the *Zeitschrift für Geopolitik*, and the men around him, like Banse and Grimm. As a "quasi-science" for the achievement of empire and self-sufficiency it is naturally primarily the science of the "have-nots." In the German form, geopolitics becomes "a nationalist

version of Marxian dialectic materialism"—which itself, it must be remembered, is philosophically based on Hegel—"both in theory and practice, transferred to the sphere of international relations, a National-Socialist revolution for the redistribution of the natural resources and wealth of this earth." And such "science" must lead to the inevitability of war. But here "have-not" geopolitics meets "have" geopolitics, determined to retain the resources they have, and this will to retain them leads equally to the conclusion of the inevitability of war, not only of this war, but to the perpetuation of war, to a cycle of world wars.

In consequence—and that is the author's second goal—salvation cannot lie in the advice of Schuman "that we, too, must learn our geopolitics," nor in the application of this very German geopolitics to the American continent, as Professor Spykman has done, but in the overcoming of geopolitics all round. For if the geopoliticians again have their way when the peace treaty is to be written, then this "victor's peace" will again be a peace only in name. For, like Professor Carr in his brilliant book *Conditions of Peace*, so this author warns (p. 132): "No peace, however restrictive in its terms, no machinery of enforcement, however relentless in its control, can ever guarantee permanent submission to conditions imposed upon the vanquished by the victor."

JOSEF L. KUNZ

Refugee Settlement in the Dominican Republic. A Survey Conducted Under the Auspices of the Brookings Institution. Washington: Brookings Institution, 1942. pp. xvii, 410.

From the viewpoint of international relations, the chief interest of this volume is its analysis of the possibility of easing the international refugee problem through the settlement project in the Dominican Republic. It may also be read in a broader context as a contribution to the problem previously discussed in the remarkable study by A. Grenfell Price, *White Settlers in the Tropics*, 1939, of whether settlement of whites in the tropics is feasible. The first question is weighed with admirable thoroughness and scientific objectivity by this eminently competent group. The names of Dana G. Munro, Harry B. Smith, Ellis Goodwin, John Gange, Atherton Lee, James Jensen, George Burkhardt and Joseph Schneider deserve to be remembered. It is the more regrettable that the authors did not find it within their terms of reference to deal with the larger question of whether, without the imponderable factors of social, religious or national idealism, settlement in such a trying environment can have enduring success.

Of particular interest to international lawyers is the Agreement between the Dominican Republic and the Dominican Republic Settlement Association, Inc., January 30, 1940 (text pp. 405-410; analysis pp. 282-284). This document, while a charter rather than an "international treaty," is important because of the pledges made by the government to pass a number of legislative acts in order to facilitate immigration and settlement. There are no

provisions relating to disputes arising out of the agreement, such as were included in the numerous agreements of the Kreuger Match Company with the various European governments. It appears that the Dominican courts alone are competent to decide controversies between the Association and the Government. The book contains, in addition to a general discussion of the economics of refugee settlement, an excellent and comprehensive economic survey of the Dominican Republic. This section of more than 200 pages should be welcomed both here and in the Dominican Republic itself as an outstanding contribution to our knowledge about our good neighbor. The book concludes with a balanced, objective discussion of the prospects of refugee settlement.

The conclusions of the authors are not encouraging. The Dominican Republic agreed to absorb 100,000 refugees; but the authors find that the Republic cannot now absorb and support much in excess of 5,000 refugee colonists. In two years of settlement activity, 474 persons have been moved into the Republic, and the first colony of Sosua is already overcrowded. This settlement is a very costly venture, having a unit cost per male settler of \$3,000. Moreover, "the rising tide of color (in the Republic) must inevitably engulf any but the most carefully prepared and protected white settlement." In sum, the authors feel that the transfer of European refugees to a tropical area means only their transfer from an area of political pressure to an area of economic pressure; however, every individual who does find a home in the Republic is a human being saved from death or degradation, and that, in the authors' view, justifies the effort and expenditure involved in the Sosua project.

JACOB ROBINSON

The Guilt of the German Army. By Hans Ernest Fried. New York: Macmillan Co., 1942. pp. xi, 426. Index. \$3.50.

This is an important volume for several reasons. First of all, it gives an historic and sociological analysis of the development of German militarism since 1918. Furthermore, it emphasizes one aspect of National Socialism which has generally been neglected or dealt with only in the most general terms. Finally, it offers, implicitly and explicitly, sound advice to those who, after victory is won, will have to deal with a defeated Germany.

Dr. Fried's volume makes convincingly clear the intimate relationship between the psychological and political situation in which the professional soldiers of the German Army found themselves during the years following the first World War, and the development of National Socialism. The legend of the "stab in the back," the thirst for revenge, the use of the Treaty of Versailles as scapegoat, the contempt for democracy and parliamentarism, the hostility to labor unions, social reforms, and religious minority groups, the belief in the ultimate value of military force, the adoration of authority, the glorification of military life as the highest form of social organization—all this is common to the traditional militarism of the German Army and to

National Socialism alike. The German Army, however, was limited in the practical application of those convictions by a code of professional ethics which the Prussian military caste had upheld for centuries. Yet once this code of ethics is no longer recognized as binding and those convictions have become the political instruments of a mass of desperate fanatics, Prussian militarism almost of necessity degenerates into German National Socialism.

Besides those ideological affinities there has been from 1918 to this day a community of vital interests between the German Army and National Socialism. From the Free Corps, the Black Reichswehr, the Kapp Putsch, the Munich Putsch of 1923, to the conspiracies of the early thirties, the German Army used the Nazi Party for its purposes and the Nazi Party operated with the secret but very active support of the Reichswehr. The volume gives an illuminating account of these interests and connections which made the German Army and the Nazi Party political associates.

The greatest value of the volume, however, lies in the counsel it offers the makers of the future peace. The problem which will confront the makers of the peace consists in preventing the German militarists from regaining political and military power. The first condition for the successful performance of this task is the insight into the continuity of German militarism which, expressing itself in different political manifestations, has remained throughout the centuries identical with itself. To the substantiation and popularization of this insight this book makes an invaluable contribution.

HANS J. MORGENTHAU

World Organization. A Balance Sheet of the First Great Experiment. Washington: American Council on Public Affairs, 1942. pp. xiv, 426. Cloth, \$3.75; paper, \$3.00.

This publication carries the proceedings of the Institute on World Organization held on the campus of American University from September 2-13, 1941. Dr. Laura Puffer Morgan (on behalf of the Institute) acknowledges the assistance of the Carnegie Endowment for International Peace and the American Council on Public Affairs for making the publication possible. There is an introduction by Carl J. Hambro.

Because of the nature of the publication, it is felt that a detailed indication of the contents might prove helpful. In Part I, Pitman B. Potter discusses "The League in the Development of International Organization" and Egon Ranshofen-Wertheimer presents an interesting analysis of "Geneva and the Evolution of a New Diplomacy." Part II contains articles on "The League of Nations in World Politics" by Arthur Sweetser; "Economic and Financial Issues" by Michael A. Heilperin; "Health, Nutrition, and Housing" by Frank G. Boudreau; "Social Questions" by Elsa Castendyck; "Armaments and Measures of Enforcement" by Laura Puffer Morgan; "Communications and Transit" by Jan Hostie; "Intellectual Coöperation" by Henri Bonnet. Part III carries monographs by Benjamin Gerig on

"Mandates and Colonies" and Jacob Robinson on "Minorities." In Part IV Helen Dwight Reid discusses "Danzig" and Sarah Wambaugh reviews the significance of "The Saar." Hugh McKinnon Wood writes on the creation of the World Court and its work to date. The International Labor Organization is discussed by David H. Blalock and Andrien Pierre-Tixier. Jan Hostie and Hans Kelsen contribute by writing on the "Revision of the Covenant of the League." Finally "The American Continent and the League" is the topic dealt with by Ricardo J. Alfaro.

Space does not permit of adequate comment on this volume. The monographs are on the whole of a high caliber, as the names of the authors would assure. We find in the publication many good illustrations of how to build for the future upon the experiences of the past. The volume contains much information of value. It is distinctly a worthwhile contribution in the field of international organization.

J. EUGENE HARLEY

British Rule in Eastern Asia. Lennox A. Mills. Minneapolis: University of Minnesota Press, 1942. pp. x, 581. Index. \$5.00.

The English edition of this book appeared just prior to Pearl Harbor and the American edition was brought out in the late spring of 1942. Professor Mills states in his preface that it seemed premature to attempt a revision before the appearance of the American edition. His work, therefore, loses some of its value because it was predicated on the maintenance of British rule in Malaya and Hongkong. In fact, his discussion and his conclusions seem a little unreal in the light of events since December 7. The author points out, however, that problems of postwar reconstruction in Malaya and in Hongkong will still be the problems he describes so very succinctly in his book. This will be true only to the extent that the new conditions present since Japan conquered these British possessions are taken into account.

Part I deals with British Malaya and includes chapters on the government, finance, trade, labor, agriculture and social services in the Straits Settlements and the Federated and Unfederated Malay States. Part II deals with Hongkong, covering the same topics in a more condensed form. The author's discussion of these subjects is comprehensive and well-documented, although there is some duplication in the writing and more careful proof-reading would have improved the make-up of the book. Professor Mills believes that the British have simply taken Malaya for granted and that this attitude explains their reluctance to deal effectively with native demands for more participation in the government, as well as their failure to win the support of the Malays for defense of the colony. It might also explain the failure by the British themselves adequately to plan for the defense of Malaya against Japan.

The economic dependence of Malaya and Hongkong on world market conditions is clearly shown. The author's chapter on tin and rubber in Malaya

is excellent. The effects of German and, more particularly, Japanese competition in trade are clearly set forth. Perhaps the most important part of the book from the standpoint of postwar problems is the author's discussion of the Chinese position in Malaya. He shows how the Chinese population has attained a very strong economic and political position in the colony and he describes clearly the means by which the British have dealt with this situation. His discussion of the Secretariat for Chinese Affairs is very illuminating, and he points out that self-government for Malaya might mean a government dominated by the Chinese and not the Malays.

On the whole, this work is a factual presentation. Professor Mills seems to accept the view that the solutions to any of the economic or political problems of Malaya or Hongkong must be such as not to prejudice continued British control. But this was written before Malaya and Hongkong were captured by Japan. Students of the problems of southeast Asia will find this book very useful as a reference work and an excellent supplement to the studies produced under the auspices of the Institute of Pacific Relations.

WILLIAM C. JOHNSTONE

The Caribbean Policy of the United States, 1890-1920. By Wilfrid Hardy Callcott. Baltimore: Johns Hopkins Press, 1942. pp. xvi, 524. Index. \$3.50.

A scholarly and well-rounded investigation of the Caribbean policy of the United States since 1890 has long been needed. Unfortunately, the volume under review fulfils that need only in part. Of great value is the new material gleaned by the author from the diary of Chandler P. Anderson and the private papers of Bryan, Bunau-Varilla, E. M. House, P. C. Knox, Lansing, Root, Taft, and Woodrow Wilson. So excellent is his use of these manuscript collections that it seems unfortunate that Professor Callcott has apparently failed to examine the unpublished archives of the Department of State. Even less justifiable is his annoying habit of relying upon secondary authorities where published documents are readily available. For a United States Supreme Court decision, a well known international arbitration, or the text of a treaty the reader is referred to someone's "convenient summary" of the document; for direct quotations from the German Foreign Office, statements in the House of Commons, or votes in the United States Senate there is never a citation to *Die Grosse Politik*, *Hansard*, or the *Congressional Record*. Too often, for a statement on public policy by a Secretary of State or a President, the footnote reads "as quoted by" so-and-so.

Professor Callcott's thesis that the Caribbean policy of the United States "was not the Monroe Doctrine at all," but a distinct policy, is not novel; but it seems to the reviewer that the author oversimplifies his case when he concludes (p. 210) that, once "the observer seizes the one essential idea of control of the canal and its approaches" the "apparently hopeless confusion" and "endless contradictions" of the Caribbean policy "fall into a reasonably

consistent pattern," with Dollar Diplomacy "merely an irritating barnacle that attached itself to the main idea." Despite these flaws (and occasionally slipshod writing), the volume is probably the best survey of the subject available. The author has read widely in secondary sources and, by delving in the private papers mentioned above, has thrown new light on a number of events.

HERBERT W. BRIGGS

Latin America: Its Place in World Life. By Samuel Guy Inman. New York: Harcourt, Brace & Co., 1942. pp. viii, 466. Index. \$3.75.

This volume was written to aid in the enormous task of promoting inter-American understanding and a continental unity by encouraging readers to think continentally in plans to develop a program of continental (hemispheric) coöperation. Following an introduction on "continental thinking," it presents successively 24 chapters, arranged under five divisions: three chapters (1-3) on perspective and racial backgrounds and later immigrations; four (4-7) on brief historical résumés of chief events on the hard road to democracy (struggle for independence, early political ideas and obstacles, foreign interference and interests and evolution of the various States to 1900); nine (8-17) on the republics of today (especially emphasizing social background, the evil effects of the operations of dictators and foreign bankers and of industrial developments, the political and economical aspects of boundary disputes and the high spots in the complicated wrangle over Mexican oil); six (17-22) on outline pictures of new forces operating to change old conditions; and two concluding chapters (23-24) on the American continent ("Pan American Relations" and "Poets versus Engineers"). The volume is well organized and interesting. Although not equipped with reference footnotes, it has an appended section of extensive and helpful bibliographical notes (22 pp.) arranged according to the five divisions of the narrative. It has an index of ten pages.

Since 1913 the author has been interested in organizations for North American coöperation with Latin America. Through his extensive travels and studies he has reconfirmed the earlier expressions of belief that there is a real basis for continental unity. He boldly asserts the opinion that every country of the American continent started with a clear understanding that the continent was committed to the "American System" and that none had ever hesitated to carry out this American spirit. Believing that the American continent will continue to assume a more dominant place in world life, he urges that in order to avoid the destructive example of the divided continent of Europe, it should be a united continent with full strength for building "a new social and political order." Among proposed changes to facilitate future action he advocates plans to revamp the Pan American Union into an American Association of Nations with a purpose of larger coöperation and coördination in the new period of inter-American life.

J. M. CALLAHAN

BRIEFER NOTICES

Les droits de l'Homme et la Loi Naturelle. By Jacques Maritain. (New York: Editions de la Maison Française, Inc., 1942. pp. 143.) The brevity of this important book is compensated for by its logic and lucidity. The author defines natural law from the Christian standpoint in all its social implications: in the community, in the Church, in the State, and in industry. Natural law, as defined by the author is "un ordre ou une disposition que la raison humaine peut découvrir et selon laquelle la volonté humaine doit agir pour s'accorder aux fins nécessaires de l'être humain. La loi non écrite ou le droit naturel n'est pas autre chose que cela." The author identifies in certain respects the common law and international law with natural law. Though not a book on the law of nations, it deserves reading by all who seek to establish the philosophic bases of international law. P. M. B.

Los Problemas de la Seguridad Continental, en el Derecho Internacional de América. By Carlos Sánchez i Sánchez. (Ciudad Trujillo: Imprenta Montalvo, 1941. pp. ii, 155. Index.) This little book contains two papers, presented by the author at the Second Inter-American Caribbean Conference and at the Eighth Pan American Scientific Congress respectively. The first, *El Caribe: Mare Clausum*, was written to support the author's proposal that the American nations declare the Caribbean a closed sea so far as belligerent acts are concerned. He supports this proposal both by historical and legal arguments, reaching the conclusion that the States of the region have an indisputable community of interest in the Caribbean Sea and that both considerations affecting their security and historical precedents give them the right to demand that other Powers refrain from war-like operations there. In the second essay the author discusses the principles enunciated in Washington's Farewell Address and in the Monroe Doctrine, in their relation to the international law of the Western Hemisphere. He shows that both declarations were a response to the peculiar conditions and needs of the American nations as a whole and he marshals an imposing array of quotations from writers on international law to demonstrate that the weight of authority supports his contention that the Monroe Doctrine may be regarded as a principle of American international law.

DANA G. MUNRO

Gouvernements nationaux et Accords internationaux. By Théodore De Félice. (Geneva: Georg et Cie S.A., 1942. pp. 168. Fr. 7.50.) One of the big problems confronting us in the postwar era will be the building of an international legislative system by means of which the world of nations can keep pace with the far-reaching changes taking place in a dynamic society. Certainly progress in the realm of international organization depends to a great extent upon the conclusion of international agreements—agreements to which sovereign States must give their consent in one form or another. Recognizing the fact that the formal ratification process has slowed up the conclusion of such agreements, the author examines the ways and means by which this stumbling block has been avoided in Switzerland, Great Britain and the United States. Little will be found in the monograph that is new to the student of international legislation. The chief merit of the work (which is not too well written) lies in the fact that it catalogs numerous examples of international agreements which have been brought into force by national executives acting on their own authority, by national administrative officers,

by international organizations, etc., without going through the normal ratification process. While the writer shows little familiarity with existing literature in the field, he has used his primary sources well. He concludes his study by advancing a number of practical suggestions for the future. This is the kind of spade work which should be done in many areas of international law before the reconstruction period comes. Unfortunately there is no index.

FRANCIS O. WILCOX

The Conference of Ambassadors (Paris, 1920-1931). By Gerhard P. Pink. (Geneva: Geneva Research Centre, 1942. pp. 293.) This timely and well-written study considers the Conference of Ambassadors as an institution of public law. The method makes possible a clear statement of the activities of the Conference and its rôle in administering the peace treaties and in dealing with the vexatious problems following World War I. The disadvantage of the method is the temptation it presents to regard the Conference of Ambassadors as an institution whose autonomy was its significant aspect. The Council was really a convenient agent of the Powers. They used it to focus consideration of postwar problems in a given place by a given group; as an instrument through which decisions determined by the Foreign Offices would be proclaimed and enforced as a joint product; and sometimes as a device to avoid the taking of public responsibility for decisions by individual Powers. Thus when the Council is accused of exceeding its powers, or performing functions of the League, on the basis of the declared competences of each, it is the policies of the Powers which are in question primarily; even if it be conceded that, in the public law sense, they might have been more accurate in the employment of the competences they had authorized. Nevertheless, this study is extremely valuable as an administrative history of the instrument the Powers used. The emphasis on legal powers and limitations produces an admirable clarity and precision, by measuring the work of the Conference according to a definite and reasonable standard. The book should be of great value to those now concerned with the forms and functions of a new international directorate. Dr. Pink has examined all available materials, and all important tasks of the Conference are discussed. He and the Geneva Research Centre are to be commended for publishing now, when such work is needed, without waiting for the opening of the Conference archives which would make a definitive study possible.

LLEWELLYN PFANKUCHEN

Man's Most Dangerous Myth: The Fallacy of Race. By M. F. Ashley Montagu. (New York: Columbia University Press, 1942. pp. xiii, 216. Index. \$2.25.) The author defines the objective of his book as "an examination of a contemporary aspect of 'race' theory." In his judgment "the idea of 'race' represents one of the greatest, if not the greatest, of the errors of our times, and the most tragic" (p. 3). Regarding the anthropological concept of race, Professor Montagu tells us that it is "a conception which in the light of modern field and experimental genetics is utterly erroneous and meaningless" (p. 28); and again: "If we do no more than resign this term to the oblivion to which it properly belongs, this would in itself serve as a contribution towards clearer thinking" (p. 72). So far as the "race problem" as it arises in human society is concerned, it is "essentially a problem of social relations," and "not a biological problem at all. . . . Race is a term for a problem which is created by social factors, and by social factors alone" (p. 70). Of particular interest to the readers of this JOURNAL will be found the chapters on The Origin of the Concept of Race (1) and on "Race" and

War (11). In the concluding chapter ("Race" and Democracy) the author makes an eloquent appeal for the establishment of political and social equality among all men in fulfillment of the spirit of the American Declaration of Independence. Written by an outstanding anthropologist, this book is intended for the general reader. It is to be hoped that it will be widely read. There is no recent publication which could do more toward clarifying the reader's thinking "upon an important subject about which clear thinking is generally avoided."

GERHART HUSSERL

The United States and the Far East: Certain Fundamentals of Policy. By Stanley K. Hornbeck. (Boston: World Peace Foundation, 1942. pp. vi, 100. Cloth \$1.00; paper, 50¢.) Dr. Hornbeck presents a concise review of American Far Eastern policy in the 57 pages of text, supplemented by four appendices, containing the most important documents of the years 1938-1941, which complete the volume. The fundamental point of view presented is that: "The so-called Far Eastern policy of the United States is *not* a separate and peculiar policy. It is simply the application of *the* foreign policy of the United States with countries in a particular geographical area" (p. 3). Having established briefly that as the point of approach, the author makes a summary statement of American Far Eastern activities, objectives and policies up to 1932. The decade of relationships, 1931-1941, is treated somewhat more extensively. The book is obviously directed toward informing the general public rather than being intended to add materially to the specialist's knowledge of the subject. The lucidity of the writing and the skill shown in summarizing should win a wide audience for the essentially official views of policy so ably and compactly presented. The specialist should read the book, however, knowing that it will only make him await more eagerly the time when the author can undertake the complete analysis and exposition of the subject which his knowledge and experience preëminently qualifies him to write.

HAROLD M. VINACKE

British Foreign Policy. Its Formulation in Recent Years. By R. Victor Langford. (Washington: American Council on Public Affairs, 1942. pp. ix, 226. Index. Cloth, \$3.25; paper, \$2.75.) From a mass of biographical and epistolary sources, Mr. Langford has extracted an analysis of the making of foreign policy in Great Britain which should illumine many hitherto dark spots for British and American students alike. What part the Sovereign plays and how he plays it; the extent of intra-Cabinet wrangling and resultant near-paralysis; the genesis of those distorted gestures by which an inspired and interfering Prime Minister, or even an ambitious and hasty Foreign Secretary, may sometimes startle the world; the very recent and very limited doctrine of continuity from one government to another—these are only a few of the obscurities which the author clears up. Devotees of democracy will grumble about the absence of a chapter on parliament. In these days of parliamentary committees on international affairs, and of increasing popular concern about the issues of peace and war, one would have expected some attention to this factor in foreign policy, even if the conclusion reached were largely negative. The source material imposed one other limitation on the book. Those recent years before the present war, which inevitably interest us most, are only sketched in. Too few of the pertinent letters and biographies have yet appeared. Mr. Langford's documentation combines authority with entertainment, and it is to be hoped that he will expand the record.

P. E. CORBETT

British Policy in Palestine. By Paul L. Hanna. (Washington: American Council on Public Affairs, 1942. pp. xv, 214. Index. Cloth, \$3.50; paper, \$3.00.) This book is chiefly important for its accuracy in describing the Mandate of Palestine and for the timeliness of its publication. When I finished *The Holy Land Under Mandate* in 1931, I felt that I had made a thorough exploration of the three principal factors in this human political problem, namely—Great Britain, the Jews, and the Arabs—and at the end of my second volume found myself declaring that, “as recent events have proved, these people are farther apart today than at any time during the eleven years of the Mandate.” The author of this book takes up this challenge and with careful annotation pursues the story in chronological arrangement. He finds the problem no nearer solution than in 1931, and, at times, is obliged to relate conditions of violence heretofore unknown in the Holy Land. The reader of this book will learn in detail the terms of the Balfour Declaration and the interpretation by the Arabs of British promises given to them during the First World War. He will also see how the articles of the Mandate for Palestine, whose function it is to keep both Jews and Arabs in line, will always cause friction—as long as the Mandate exists. The Palestine Mandate took on a different aspect at the London Conference, as Mr. Hanna points out. He explains the British attitude as follows: “Loath to break the Balfour pledge, to offend the powerful supporters of Zionism, and to abandon the Jews already in Palestine, but even more unwilling in view of the world situation to coerce the Palestine Arabs contrary to democratic theories of self-determination and to strain relations with the Arab and Moslem peoples of the East, the British cabinet swung back to the old theory that some means of compromise must be found. . . . Since the friendship of the Arab states appeared more vital to the empire than that of the Zionists, it was natural that compromise should take the form of the largest concessions to Arab demands short of complete renunciation of the Balfour Declaration and abandonment of the national home.” Having traced the happenings in Palestine to this decisive point, Mr. Hanna is well equipped to discuss the war problems which may arise before the Second World War comes to an end. Certainly present British policy will have repercussions at the peace table.

FANNIE FERN ANDREWS

Strategy at Singapore. By Eugene H. Miller. (Washington: American Council of Public Affairs; New York: Macmillan Co., 1942. pp. xii, 145. Index. \$2.50.) This is an interesting and carefully documented case history in international politics. It is the history of the rise and fall of the Singapore Naval Base, done in 138 pages. The author has carried out patiently and skillfully, in a way that inspires confidence, the task which he set himself. He has gone back over the news and views of the last twenty years and gleaned from the contemporary press, the technical journals, Parliamentary debates, and the small number of published official papers enough material to make the story of the base clear in its main lines. The story of the great bases of the democratic world within the British Commonwealth—bases now shared by the United Nations—Gibraltar, Malta, Alexandria, Aden, Simonstown, Trincomalee, Singapore and others, has never been told effectively. One of the main points that emerges from these pages is the clear way in which Singapore was a touchstone that sorted out those whose sense of realities contributed towards the preservation of the security of the free peoples; and those who unconsciously or otherwise, because of their cultivation of illusions, were saboteurs of the peace. The question how and

by what means a small group of determined and farsighted men—Amery, Churchill, Balfour, Curzon and others—prevailed against the tide of a pacifist generation and built this great base in the jungles, does not emerge with any clearness from this book, largely no doubt because the facts are not yet available to the public. But the author has done a valuable service. We need more of such case histories in the literature of international relations.

H. DUNCAN HALL

Modern Burma. A Survey of Political and Economic Development. By John L. Christian. (Berkeley and Los Angeles: University of California Press, 1942. pp. x, 381. Index. \$3.00.) Published under the auspices of the International Secretariat of the Institute of Pacific Relations, this book is by a trained scholar on a timely subject for an audience of more than scholars alone. Eight years in Burma as the head of a technical school with wide travel over the country, plus critical study of the considerable literature and official records on Burma, have combined to yield a balanced and well-written view of what Burma is in the present strategic and political landscape. Every page exhibits objective foundation in experience and in documentation with significant footnote references to sources. An extended critical bibliography gives the roots for the author's historical, racial, religious, economic, and political conclusions on the prosperous and comparatively care-free happy-go-lucky Burma as she existed just prior to the Japanese invasion. The history of the early penetration of modern trade into Burma, of Anglo-French rivalry, of chaotic Burmese dynastic conflicts, of three Anglo-Burmese wars and the eventual Anglo-colonial relation in 1826 of Lower Burma, and in 1885-1886 (almost bloodlessly) of Upper Burma, of the later and logical separation of Burma from Indian administration in 1935—culturally the Burmese facing toward the northeast rather than toward India, of the attainment in 1937 of substantial constitutional self-government in the British Commonwealth, is ably told and well proportioned. Estimate is made of Prime Minister U Saw prior to his arrest for contact with the Japanese after December 7, 1941, at a time when on balance Burmese opinion held to the necessity of British victory. The astounding prosperity of agricultural Lower Burma with its three and one half million tons of exportable rice—exportable after feeding the fifteen million people of all Burma, and of mineral Upper Burma with its tungsten, oil, and other mineral substances, will surprise many readers. In the months before invasion, the Burma generally known was the Burma of the new Burma Road, great artery for supplies to China (to which highway a chapter is devoted), and the Burma of the growing Rangoon air junction of the East. Today more of Burma must be known before she can be rescued, as rescued she must be in the general interest.

LEONARD W. CRONKHITE

Europe, Russia, and the Future. By G. D. H. Cole. (New York: Macmillan Co., 1942. pp. 233. Index. \$2.00.) In the rapidly growing literature on the postwar settlement Mr. Cole's compact study deserves a place as a characteristic and forcible presentation of the Socialist point of view. Mr. Cole believes that "the restoration of the old State system still on capitalist foundations" has been ruled out since the attack of Hitler on Russia, although he fails to provide any concrete reasons for this startling assertion. In the opinion of the author, the only practical alternatives for the future of Europe are Nazism or Socialism, and Mr. Cole, of course, endorses the latter solution. He visualizes a Europe and a world where the former States,

shorn of much of their political sovereignty and purged of narrow nationalism, will be grouped into super-national States, built preferably on the Soviet model. Mr. Cole is rightly amused by the excessive zeal of repentant Tories who, since the German invasion of Russia, absolve Soviet leadership of any mistakes in the past and proclaim the Soviet-German pact of 1939 an unavoidable military necessity. During the period preceding the invasion, according to Mr. Cole, "Stalin and the Western Communist Parties . . . were extraordinarily and perversely blind." Past errors, however, have no bearing on the future. Mr. Cole is a firm believer in the unfailing virtues of Socialist planning which "sets out to base production on human needs and not on the prospects of profit," and this is why he turns to the Soviet Union. He imagines that "some sort of a Soviet system may suit" better the needs of Eastern and South Eastern Europe than parliamentary government, and complacently envisages a U.S.S.R. which might comprise Germany, India, China, and Japan! The elaboration of these truly fantastic schemes is interspersed with lucid pages in which the author, temporarily freed from Socialist dogmatism, discusses with his usual brilliancy the effects of the Treaty of Versailles, the rise of National Socialism, the fate of governments-in-exile, the nature of democracy, and other kindred problems. The United States plays a minor part in Mr. Cole's discussion, except as a menace to the progress of world Socialism and a force for the restoration of "international capitalist feudalism"—in case big business recovers its control over the government. He feels, however, that American influence "may, if Roosevelt's leadership holds, take quite a different turn." MICHAEL T. FLORINSKY

Eastern Europe and the United States. By Josef Hanč. (Boston: World Peace Foundation, 1942. pp. 95. Cloth, 50¢; paper, 25¢.) The lecturer on International Law and Organization at the Fletcher School of Law and Diplomacy, a former member of the Czechoslovak consular services, presents here what is on the whole an accurate picture of the problems of Central and Eastern Europe, thus maintaining the high standard so far achieved by the *America Looks Ahead* series of the World Peace Foundation. His main thesis of course is that from the point of view of maintaining world peace the United States cannot be indifferent to any future Central European settlement, but he also wisely remarks in conclusion that "it may not be the wish nor the task of the United States to attend to every detail of the Eastern European settlement," although "it is in its interest to see that the region is rebuilt on such foundations as to render it more stable politically and more prosperous economically." The economic stake of the United States in Eastern Europe is by no means to be ignored. Mr. Hanč has a little too much faith in the quality of democracy in fact of some of the Central European countries before the war, but it must be said that he has preserved an objectivity which is not always present in publications on Central and Eastern Europe. CHARLES PERGLER

Impact of the War on America. (Ithaca: Cornell University Press, 1942. pp. viii, 159. \$2.00.) These lectures, delivered by members of the faculty at Cornell University in February and March, 1942, were planned, we are told, in the hope that they might bring to undergraduates a clearer understanding of the effects which the war might be expected to have upon important aspects of American political life. They deserve a wide circulation among mature students of national and international affairs. The first lecture deals with the impact of the war on the Constitution and discusses

changes in the relation between the nation and the states from which the government will gain and the states lose; second, changes by which the President will gain power and Congress lose; third, changes in the relation of the government to the citizen by which, whether the government gains or not, the citizen will lose. There is a discussion also in each case of the chance of getting back after the war the things we may have lost. The second lecture discusses the impact of the war on American labor with such foresight that it might have been written at a much later date than last March. The effect of the war on the relations between the United States and the British Empire is the subject of the third lecture. The fourth is a reappraisal of the Far Eastern policy of the United States. The fifth deals with the United States and the balance of power. The sixth and last looks forward to the part the United States may play in postwar international organization, but refuses to draft a blueprint of a world order based either on facts as they once were or on facts as we would like them to be. The problem is stated, however, and the conclusion is reached that neither the remarkable achievements nor the colossal failures of the last forty years should deter us from attempting a better ordered world. The lectures are characterized by clear thinking, briefly expressed, on great subjects each of which might have had a volume. H. W. TEMPLE

Economic Problems of War and Its Aftermath. Chester W. Wright, Editor. (Chicago: University of Chicago Press, 1942. pp. xi, 197. Index. \$2.00.) The subject-matter of this book extends from the historic relations of industry and armaments to war economy and the probable future structure of society. The chapters are lectures delivered under the Wahlgreen Foundation for the Study of American Institutions at the University of Chicago, and they are all of high quality. The first and longest chapter, contributed by John U. Nef, is an admirable exposition of the status of armaments and industry in the 16th and 17th centuries. Despite the undoubted aid which international combat has given to technology, conditions of peace are shown to be more favorable to industrial growth than those of war. The middle part of the book deals with wartime economic problems. It includes chapters by Chester W. Wright on "Economic Lessons from Previous Wars," by Simeon E. Leland on "Next Steps in Financing the War," and by Theodore O. Yntema on "Price Controls." William F. Ogburn, in a chapter on "The War State," perceives a greater emergence of the managerially controlled State during, and perhaps after, the war. In the final two chapters Frank H. Knight appeals for a postwar return to economic individualism, and Moritz J. Bonn forecasts the regimentation of a private property society. It would appear, as between these two concepts, that of Professor Bonn is more in line with long-time probability. The book conveniently summarizes for the reader some of the best recent thinking on the economic problems created by the present war. It provides an excellent popular approach to an understanding of what is happening in the economic field. BENJAMIN H. WILLIAMS

The Native Labor Problem of South Africa. By J. M. Tinley. (Chapel Hill: University of North Carolina Press, 1942. pp. xxii, 281. Index. \$3.00.) This timely study of the native labor problem of South Africa is, in reality, a study of a problem common to many countries. It should be of special interest to Americans, for, although the author has made no attempt to relate the problem of native labor in South Africa with the problem

of various exploited groups in the United States, nevertheless in many respects a striking resemblance may be observed. The author, a professor at the University of California, was for many years engaged in the South African government service. His central theme is "that the continued existence of an important underprivileged group in any country is apt to undermine ultimately the economic structure of that country." In South Africa, where the natives constitute about 70 percent of the population, the diamond mines revolutionized agriculture when they opened in 1870 and created an agricultural problem which is constantly becoming greater. There was no laboring class among the natives, so the wage lure alone was "insufficient to attract a continuous and adequate flow of native labor to the mines." Various forms of compulsion were resorted to in order to induce the natives to work for wages. Such methods, however, did not furnish the needed workers, and some parts of the country, Natal, for instance, depended upon Asiatics to constitute an important supplementary supply of labor for agriculture, mining and manufacturing. Working conditions at best are unsatisfactory and place the workers under all sorts of discriminations. Injustice is shown by virtue of the fact that certain acts which are regarded as civil offenses for Europeans constitute criminal offenses for the natives. Part V, devoted to "Effects and Remedies," is the most interesting section of the book. Here the author shows that the native tribal life and economy has been destroyed without an adequate substitute being provided. The onus of improving their lot rests squarely upon the shoulders of the European population. This calls for a change of attitude on the part of the European population towards the natives and means a willingness to find ways of giving to the native population a greater degree of responsibility. This challenging study is a contribution towards the analysis of similar problems that will have to be faced in various parts of the world. A wealth of material is available in the form of tables, figures, glossary, appendices and bibliography. WILLIAM LONSDALE TAYLER

The I.L.O. and Reconstruction. Report by the Acting Director of the International Labor Office to the Conference of the International Labor Organization, New York, October 1941. Montreal: International Labor Office, 1941. pp. 112.

Towards Our True Inheritance. The Reconstruction Work of the I.L.O. Montreal: International Labor Office, 1942. pp. ii, 77.

These two booklets constitute a unified narrative and exposition of the interests and intents of the I.L.O. with respect to the postwar settlement. They describe the political, social and economic atmosphere in which the I.L.O. has been functioning since the war began, and summarize the proceedings of the New York Conference of October 1941. The appealing title covers a factual documentation of the I.L.O. in war time. There is a valuable topical summary of the discussion of the New York Conference and of the President's speech upon the occasion of the assembling of the Conference at the White House for one of its sessions. It was a curious conference; it came without formal invitation of the American Government; it contained none of the European neutrals in its membership, but most of the governments-in-exile. It was decidedly inter-Allied in its spirit. The whole story of the recent years of the I.L.O. in exile raises a question as to the wisdom of the departure from Geneva and the transfer of the headquarters of the Organization to Canada. The present reviewer thinks that the Organization departed from its true inheritance when it moved from neutral and friendly

Switzerland to the reluctant hospitality of the American Government. The I.L.O., as well as the League, would stand firmer today, and have promise of a brighter future had they clung to their coign of vantage in Switzerland even as the clouds of war began to lower over their heads. L. M.

The Development of the Labor Movement in Great Britain, France and Germany. By W. A. McConagha. (Chapel Hill: University of North Carolina Press, 1942. pp. xii, 199. Index. \$2.50.) Labor relations and labor movements are steadily taking on added political and economic significance in the modern world. Although the impact of war has greatly altered the status of organized labor in many countries, the end of the present conflict will, in all probability, find it ready to assume an important rôle in the future. This was true in the case of England at the end of World War I, as Professor McConagha points out in his compact volume. The British labor movement had reached such a degree of "maturity and stability" before the last war that it was able to remain essentially unaltered throughout. On the other hand, the younger labor movements of France and Germany went through an "unsettling and revolutionary experience" (p. 64). Whether these divergent experiences of World War I help to explain the different fates of labor unions in these countries in the years 1932-1940, Professor McConagha does not say. Nor does he draw any lessons from the past experience to make predictions for the future. We are reminded, nevertheless, of the fact that France has contributed great men and great ideas to the labor movement, and pre-Hitler Germany contributed some of the most enlightened social legislation in the world. These may shed some light on the future. The general reader will find this a very useful background volume which brings together in convenient form the essential facts relative to the birth and growth of labor organizations in Great Britain, France and Germany approximately to 1929, with a few comments on succeeding events. The section on Great Britain is particularly good. WILLIAM LONSDALE TAYLER

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* Mention here does not preclude a later review.

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WORLD ORDER—AN AGENDA FOR LAWYERS

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Within the last year the output of designs for perpetual peace has attained something like flood proportions. Exhortations on how to make this the last war and how to win the peace outnumber the unofficial guides to victory. The volume of these publications, and their sales figures, attest a healthy general interest in the purposes for which we are fighting and the ways and means of achieving them. Inevitably, there is much clash of counsel, and some resulting bewilderment among the reading public. But there is one characteristic uniformity; whether they describe themselves as mere "approaches" to peace, or dogmatically present a fixed "blueprint," most plans of post-war settlement advocate curtailment of national sovereignty and propose extensive and vigorous supranational organization.

Only the pathologically reactionary argue any more against the proposition that the world needs a closer-knit political and economic structure. But in the forms, functions, powers and geographical scope of recommended supranational agencies, there is much room for difference. Here lies a field for hard intellectual labor, and since man shuns like the devil the exactions of independent thinking, there is some tendency on the part of writers to fly over it on the wings of emotion and desire. Popular reviewers, indeed, when they assess the various peace-manuals, rather encourage this rushing of the hurdles. They laud the "passion" of the author's conviction and utterance, as though what is wanted were white heat rather than cool thought. Of course there is a place for fervor; but it is probably on the propaganda level, not on that of political, economic and legal analysis.

This is not a condemnation of the "all-over" perfectionist designs of world order. We owe to the federationists some cogent demonstration of past mistakes, and much patient and ingenious work on alternative forms of supranational constitution. If they themselves have not recognized the remoteness of their projects from the present limits of political possibility, they have unconsciously revealed the detailed difficulties of many a dream that had strong attractions so long as its content remained vague. Many of us, moreover, would accept world-federation as the ultimate ideal of human social organization, particularly if it does not seek to impose a dull uniformity, but allows, as it may, for the spice of life; and to reject all elaborations of the ideal because they are utopian puts a foolish damper on human aspiration.

On the other hand, one risk in the perfectionist solutions of the world's problems needs to be guarded against. They invite fanaticism, and they

breed intolerance. The ardent believer in federal union insists on that way and no other to world peace. Generalizing from the League of Nations experience—a brief episode in human history—he spurns any mere association of States. He has no patience with those who would break down the vast complex of international relations and devise the minimum new machinery to serve limited and clearly defined purposes. In so far, therefore, as he wins adherents, he adds to the opponents of those less perfect measures which are likely to be all that the governments will dare inaugurate. For it does not by any means follow that those who can be pushed to the length of federal union will easily accept a less drastic subordination of the State to the world community. They too are apt to stand on all or nothing.

It is perhaps normal that reformers should be as intolerant of one another as they are of their common enemy, the cohorts of the *status quo*. If so, they are under a duty now, like everyone else, to make an abnormal effort. Realism, as well as idealism, is necessary in all thought of the future; and which of these has the larger rôle to play, it would be hard to estimate. In any case, let us have a truce both of scorn for the utopian and of moral condemnation for those who believe in the necessity of balance of power. They may have a good deal to offer each other. Any substantial progress towards the elimination of force in international relations is going to be extremely difficult. It is going to require drastic changes of popular attitude in such concrete issues as the independence and the special prerogatives of national authorities, tariffs, the sharing of resources, foreign competition, national defense, and national welfare. It cannot begin without the most searching examination of all the factors that go to determine political decision and the most thorough planning of coöperative measures in which States may be induced to join. The time is not one for a competition for favor between moral philosophy, geopolitics, economics, political science and law, but for bringing all of these systems of thought jointly to bear on the problems that beset us.

What is the lawyer's rôle in all this? Hitherto he has taken little part in the debate. Yet, whether it be thought that the question of peace is one of building the proper constitution for world government, or that we should proceed rather by defining specific tasks and devising means to get them done without stopping to enquire what the necessary bits of machinery add up to, legal techniques would seem to be called for even in the early stages of planning. Moreover, whatever new institutions may be introduced will have to operate in a setting of law. Is that setting one that will be hospitable to effective agencies of international collaboration, or will it impede them? Surely there is much in the experience of the League of Nations to suggest that unaltered legal doctrine imposed a heavily restrictive interpretation on what looked like firm obligations of individual abstention and collective action. Is it not incumbent on the lawyer now to scrutinize his stock in trade, to see how far it can meet the new demands that seem to be emerging among the peoples mobilized against the Axis?

Some of our colleagues have openly expressed their opinion that the lawyers must wait upon political and upon economic decision. They argue that the legal function is solely one of formulation. Let the governments, with such instruction from strategists and economists as they may see fit to accept, make up their minds what they want. It will then be time enough to call in the lawyer to draft the necessary treaties and statutes. As a citizen, the lawyer may take a hand in devising plans of international administration or in building up an instructed public opinion, but at that stage, so the argument runs, he had better leave his technical equipment in his office.

I have never been able to take this passive view of the function of the lawyer as such. It has, however, many and powerful adherents—a fact which may explain the excessive resistance that law sometimes offers to social change. There is a place for the lawyer and his science even in the earliest phases of the legislative process. This is particularly true in reference to potential development in the field of international organization, for it is a technical legal task to reveal the full inter-relations between international agencies and national institutions. The consequence of constructing collective machinery without taking adequate account of its repercussions on the laws and conventions of the various States concerned is a subject on which the history of the League of Nations is eloquent. To ignore this essential part of planning, in the expectation that constitutions, laws and traditions will perforce adapt themselves, is to risk disillusionment. In the case of the League, it was not the national institutions that accommodated themselves to the new agencies and procedures at Geneva, but the latter which had to be pared down by “interpretation” to conform with the unexpectedly stubborn domestic habits of the member States.

The strongest and most persistent case against the peace settlements of 1919 is that they had too much politics, too much law, and too little economics. In the quarter-century that followed, the economist has everywhere come into his own, some would say more than his own. The economic basis of power, and the connection between economic factors and peace, have become more generally acknowledged if not understood. This is a good thing; but in the current emphasis on new economic adjustments in the relations of States, as well as within States, there is some danger that political factors and the need for new legal principles may be underestimated. One example may serve to make this clear. Much attention is being given now to a more intelligent direction of future international investment, and proposals are under consideration for a central agency, possibly connected with a world bank, to supervise the purposes, terms and security of loans moving across national boundaries. Hitherto, the writing upon this subject has had little or nothing to say about the changes and developments in international and national law concerning the rights and duties of lenders and borrowers that must accompany such an innovation if it is to have any chance of success. Is the legal profession doing all that it should to prepare itself, and to

prepare the law, for a truer reflection of changing economic demands and policy? Is it enough to say that the instruments providing for an international investment agency, and any other organs that the economist may advise the statesmen to create, will at one stroke make all the new law required, and that the legal profession will have performed its whole office in drafting such instruments and afterwards advising any interested client what they mean?

It may be that the governments of the United Nations already have all the answers to these and similar questions. On the other hand, it is conceivable (shall we say probable?) that they have not, and that their official advisers may be keeping an eye even on unofficial publications in the search for ideas.

In suggesting an agenda for lawyers who may wish to bring their special training and aptitudes to bear on the international problems with which the war is confronting us, I propose—at grave risk of frightening off the reader—to begin with some items of a very general nature. They are aimed primarily at those who are inclined to approach peace by way of an “all-over” organization.

Everyone is aware of some pressure for the recognition and implementation of a world legal order. There is a demand for an effectively working world community, with laws that will be unmistakably proclaimed and consistently enforced. But some hold that this must be a community of individual human beings, others insist that it cannot be more than a community of States, while a third group (probably the largest) fails to distinguish the two and demands a conglomeration of incompatible elements drawn from both. It is by no means uncommon to find one and the same person joining in the demand for universal recognition and enforcement of certain “fundamental rights” of the individual, and yet denying the individual any personality in international law and refusing him access to international courts in claims against his own or other States. This is perhaps one of the more elementary confusions, but it is common enough to suggest the need for painstaking legal analysis of the implications of any effort to provide the individual with a universally valid bundle of rights.

A similar uncertainty surrounds the question whether the delegates to any deliberative or legislative agency of the world community should be elected by direct popular vote and should be responsible to their constituencies, or should be appointed by and responsible to their States. Popular representation would seem to presume a world community of individuals in which the State becomes no more than a partially autonomous local unit, like the units of a federal union; while the other system presupposes the continuance of the State as the grouping having most meaning for the individual and most power for action. One system works *over* the State and tends to atomize it; the other preserves the State intact and works *through* it. The necessity of building up popular interest in and loyalty to the agencies of a world community argues for the first; while variety of political tradition, and

the strength of nationalism, recommend the second. It should not be assumed that we must go the whole way in either direction; a compromise may be both possible and wise. Any compromise, however, needs to be consciously worked out, the fullest account being taken of its probable consequences. It should not be a haphazard collection of paper specifications irreconcilable in practice.

In the past we have talked loosely about a family, society or community of nations, but the concept of community has never found expression in the prevailing doctrine as to the nature and authority of international law. If it had, the idea that a State is bound only by its own consent, that it is not subject to any external authority—in a word, the notorious doctrine of sovereignty in its external aspects—could never have achieved its importance and respectability. Any advance towards a more effective “rule of law” in world affairs implies a *pari passu* clarification of the relation between international law and the law of the State.

The theory of “incorporation,” which declares that international law is part of the law of England or of the United States, does not touch the heart of the problem. If it means that national courts must apply rules concerning the conduct of States in so far as those rules have been incorporated in the national law by legislative act or other process, it says no more than that international law may be a material source of national law. If it means that the whole of international law is *ipso jure* embodied in the national law, it carries with it the important limitation that, so far as application by the national court is concerned, the rule of international law may be changed at any moment by national statute.¹

English and American courts hold themselves bound by statute, even when it is clearly contrary to a rule of international law. They do their utmost by way of interpretation to avoid such conflict, but where the language of the statute is clear they will apply it in spite of its nonconformity with the law of nations.²

¹ See Picciotto, *The Relation of International Law to the Law of England and of the United States of America* (1915); Potter, “Relative Authority of International Law and National Law in the United States,” this JOURNAL, Vol. 19 (1925), pp. 315–326; Dickinson, *The Law of Nations* (1929), pp. 39–75, with the cases and opinions there cited; Ruth D. Masters, *International Law in National Courts* (1932); Kopelmanas, “*Du Conflit entre le Traité International et la Loi Interne*,” *Revue de Droit International et de Législation Comparée*, 3rd series, Vol. 18, 1937.

² For Great Britain see *The Zamora*, [1916] 2 A. C. 77; for the United States, *Cook v. United States* (1933), 288 U. S. 102, 120, and *United States v. Payne* (1924), 264 U. S. 446, 448. For the practice in Germany, France and Belgium—which is substantially the same as in the English-speaking countries—see Ruth D. Masters, *op. cit.* The only instance known to the present writer in which a constitution has laid down a clear rule that no law contrary to a treaty shall be valid is that of the Spanish Constitution of 1931, Art. 65, quoted in Mirkine-Guetzévitch, *Droit Constitutionnel International* (1933) 161 (cited in Pfankuchen, *A Documentary Textbook in International Law* (1940) 41). The Swiss Federal Tribunal has, however, declared that the terms of a treaty “*doivent primer, en cas de collision, les dispositions de la loi Suisse*” (cited by Kopelmanas, *op. cit.*, 97).

The lawyer commonly explains this by the statement that municipal and international law are different and unconnected systems. They are different in character, it is alleged, in that the second is a sort of self-denying ordinance deriving what authority it has solely from the consent of its subjects; they are unconnected in that they rule in entirely separate realms. The national court must apply national law; but its decision leaves the question still open in international law. The State injured by the decision may still invoke international law against the State from whose court the decision proceeds. But how is this dualism to be reconciled with "incorporation"?

All law purports to govern the conduct of human beings, even though international law is primarily concerned with the conduct of human beings acting as agents of those groups we call States. If jurisprudence were a pure science obeying the rules of logic, the recognition of international law as the law of a community of States would imply a clear-cut subordination of municipal law, since obedience to the second in defiance of the first would be a denial of community. There could not then be, as Kelsen has demonstrated,³ any conflict, since the alleged municipal rule would be not law to the extent of its incompatibility with international law.

This, of course, is the kind of "conceptualism" that recent American jurisprudence abominates. It becomes a vice where the production of the syllogism is taken as conclusive proof of what the law is. On the other hand, lawyers have always prided themselves on their logic, overlooking the multitudinous lapses of their material; and so long as deduction plays any part in the processes whereby the law is "discovered," there will be some point in exploring the logical consequences of alleged principles. The current scorn for reasoning from concepts is an unnecessarily crippling form of intolerance.

A practical consequence of a monism that established the primacy of international law might be that national courts, in dealing with the rights and duties of States, would act as judicial agencies of the community of States and declare any offending rule of municipal law to be *ultra vires* and void. This function would be analogous to that performed when they pass upon the conformity of acts of national authorities with a national constitution. How much this would simplify the enforcement of an international "bill of rights" needs no elaboration.

Such a logical and perfect legal unity is hardly to be counted upon. Two useful steps in the general direction may, however, be possible. The first might take the form of a collective and official enunciation of the principle that no State may plead anything in its constitution or laws to justify failure in an international obligation. Some, perhaps many, specialists in international law would hold this unnecessary. They would assert that it is already a rule in the law of nations, and they might support this contention with a line of authority commencing with Secretary Bayard's letter to Mr.

³ *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 146-147.

Connery in 1887,⁴ up through the Harvard Research in International Law,⁵ to the Permanent Court of International Justice. But the very frequency with which the court has felt it necessary to touch on the point⁶ indicates how common the plea of incompatible national institutions still is, and how little impression our principle has made on the legal mind. The second step—more difficult, but still not beyond the limit of reasonable hope—might be a collective declaration of a positive duty in addition to the negative one just stated. This would be a duty for every State to bring its laws and institutions into harmony with its obligations under international law. Here again is something which at first glance may seem a little superfluous. Is it not necessarily implied in the negative duty? In reality, it goes a long way further. The first step merely makes it clear beyond dispute that international obligations are not dependent for their validity and enforceability on the absence of incompatible national laws and institutions. The second adds a new duty—to delete from the national statute-books all laws and regulations the *application* of which would constitute a breach of international law or would even seriously impede the performance of an obligation. So far as the first is concerned, the State might maintain any laws and institutions it pleased, provided it did not make them an excuse for violating the law of nations; the second makes it mandatory to repeal offending laws.⁷ The object of course would be to avoid that frequent cause of international dispute—the invasion of the right of other States by officials carrying out national laws.

We can safely leave to the scholars, for elaboration when the times are more propitious, such questions as: If international law is to be regarded as the law of a world community, having an objective validity independent of the consent of any particular State, what is the source of its authority? Is this source the will of the world community, and if so where must we look for the expressions of that will?

On the other hand, something in the field of theory which calls for immediate attention is the legal status of war, or more generally, of the use of force by States. We have gone on glibly talking about a law of nations without seriously combating the doctrine, prevalent not only in foreign

⁴ Moore, *Digest of International Law*, Vol. 2, p. 235.

⁵ *Responsibility of States* (1929), Art. 2, with comment, and *Law of Treaties* (1935), Art. 23, with comment.

⁶ See publications of the P.C.I.J.: Series A, No. 7, p. 19; No. 24, p. 12; Series B, No. 7, p. 16; No. 17, pp. 32 and 35; Series A/B, No. 46, p. 167.

⁷ In its advisory opinion on the Exchange of Greek and Turkish populations (Series B, No. 10, p. 20), the Permanent Court of International Justice declares self-evident the principle "according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." The words "necessary to ensure" seem to beg an important question. As the law of nations now stands, may a State not fulfill its obligation by action or abstention contrary to its own law, leaving that law nevertheless still in force, unless the obligation is specifically to alter its existing law by repeal or by new legislation?

offices but in text-books, that a State may, by declaring war, legalize any kind of violation of the so-called rights of another State. The Briand-Kellogg Pact of August 27, 1928, was on paper an outlawry of war as an instrument of national policy. The surrounding negotiations showed, however, that the parties were firmly reserving not only the right of self-defense, but the right to decide without appeal what constituted self-defense. Failing general submission to some impartial authority empowered to pass on the plea of self-defense, the pact could scarcely be said to impose even a legal, to say nothing of a practical, limitation on violence by States. A further loophole, resorted to by Japan in the "Chinese incident," was the absence of any established rule determining when force constituted war.

The modern State holds an almost complete legal monopoly of force within the boundaries of its authority. It permits self-defense and, to a limited extent, the direct defense of property. But it asserts jurisdiction to determine whether any given use of force was a proper exercise of these rights of defense. The victim of violence has a *prima facie* case casting on his antagonist the onus of proving self-defense.

It does not follow that because the State has this monopoly of force over the subjects of its law the world community must have a similar monopoly over States. But considerations which have led to the State monopoly may recommend the same principle in the community of States. We shall in all probability have to be content, in international law, with a very gradual approach to the degree of effectiveness attained by many municipal systems, and progress may well depend less upon any formal prohibition of force than upon the development of substitutes for it similar to those which have been provided in the national domain. The connection between effective law, on the one hand, and organized sanctions and organized legislative procedures of peaceful change, on the other, is a subject that still offers scope for legal study.

This list of points where the theory of international law seems to call for general reconsideration might be prolonged indefinitely. But the connection between organization and law suggests the last of the more theoretical items which I propose to include. Those who advocate amending the law by the enunciation of new duties and rights are often met with the objection that it is useless to do this without first establishing the centralized force necessary to guarantee the submission of disputes to adjudication and the execution of judgment, and without creating a central legislative authority empowered to change existing legal situations which impose hardship. Would a broader study of the history of legal institutions sustain this objection or not? There is some evidence in the development of early communities that agencies may gradually evolve to enforce rights and duties legally formulated but at first only vaguely sanctioned, and that law may attain a higher level of effectiveness than has hitherto been reached in the international field before any clearly differentiated legislative authority has emerged.

Such an inquiry must of course guard against the temptation to jump from premises in the growth of States to firm conclusions in the evolution of a universal community. The tendency among designers of world constitutions is to stress the reduction of distance, the speed and intensity of communications, and the spread of industrial techniques, as factors of unity, while underweighting those diversities of race, language, religion, habit of life, social values, political structure, and power, which still impede collective organization. It remains true, nevertheless, that, in our Western civilization, law and political organization have spread out from small nuclei to widening areas and populations, subordinating in the process highly diverse local groups. It is also clear that many of the forces which knitted smaller communities into nation-States now operate on a world-wide scale and challenge the utility of existing political and economic barriers. The analogy between the development of the modern State and the task of establishing some elements of world government may not, therefore, be quite the series of pitfalls that recent warnings make out. On the contrary, handled with objective legal scholarship, it may yield valuable instruction.

The questions thus far propounded are of a type likely to be despised by those who take the view that law is or should be merely a tentative *ex post facto* formulation of principles immanent in the actual practices of individuals and groups. They are theoretical and abstract, and to tarry over them, especially in these feverish times, is to risk the accusation of living obstinately in an ivory tower. This view, however, need not be taken as conclusive, nor the accusation as annihilating. Theory, *a priori* reasoning, "conceptual jurisprudence" has had all too much influence upon law in the past, and has therefore come in for violent attack. As usual, the attack in its extreme form aims at the complete abandonment of old methods. But theory will survive the onslaught, and will go on playing a considerable part in the shaping of precepts that will in turn influence practice, even though it be admitted that law is not an end in itself, but only a method of achieving ends.

There is, however, no need to insist that every lawyer must concern himself with this kind of subject. For those who eschew the abstract and theoretical, an abundance of concrete and practical problems present themselves. A few suggestions follow.

Nearly everyone who has anything to say on the organization of peace now holds that we can and must have a World Court and that we can and must give it obligatory jurisdiction in all disputes between States turning on their legal rights and duties. It is commonly recognized that the Permanent Court of International Justice rendered good service, and the assumption is made that we need simply put it in operation again, with enlarged jurisdiction and possibly a few improvements of structure. What escapes attention is that the composition of the court was a delicate compromise between the demand of the greater States for representation and the claim of the smaller

States to legal equality, and that the success of the compromise depended on election simultaneously in the Council and in the Assembly of the League of Nations. Unless, therefore, we assume that the League will be reestablished in more or less the same form, it becomes necessary to devise some other way of manning our World Court.

As for obligatory jurisdiction, there is some ground for hope in the fact that more than forty States adhered to the optional clause in the statute of the Permanent Court of International Justice.⁸ The most essential condition of our reaching such a point again—to say nothing of going beyond it to universal obligatory jurisdiction—is, however, the agreement of the United States. To accept the jurisdiction of a World Court, with the reservation that a *compromis* requiring the consent of two-thirds of the Senate must precede the submission of any dispute, would not be to confer obligatory jurisdiction. It does not fall within the functions of the lawyer to persuade a legislative body that it can and should approve an undertaking to submit future disputes without retaining a power to prevent submission in any particular case; but at least let us be clear about the bearing of such a prerogative on the problem of effective international adjudication.

The whole question of the survival, composition and powers of the court is in the melting-pot. Since that is so, the subject is one for fresh legal study. The size of the court; the tenure of its judges; the mode of election; the practice of adding *ad hoc* national judges when one or more of the parties before the court has no national on the bench, instead of requiring judges to withdraw when their own State is involved; all of these are problems meriting further examination. Not one of them can be approached without encountering the question how far the principles of detachment and impartiality can cede to the political pressure for representation, without jeopardizing the judicial character of the court. That is a point at which the lawyer's opinion, based on his knowledge of the working of courts of justice, should have some weight.

When the composition of the court has been satisfactorily settled, and a method found of conferring upon it obligatory jurisdiction in cases involving claims of right, there still remains a thorny problem in which guidance may properly be expected of the legal profession. Everybody knows that the bitterest disputes between States—those most likely to lead to war—cannot be put to rest by finding and declaring the law applicable. In disputes that lead to war one party is usually demanding far more than his rights under the existing law. His demand is not for that reason necessarily wrong in a moral sense. It may be the expression of a real and urgent human need. A similar situation frequently arises between individuals and groups within the State. Within the State, however, an adjusting agency—an agency for the peaceful change of situations which, though legal, impose what are considered inequitable hardships—exists in the legislature. Apart from the

⁸ Hudson, *World Court Reports*, Vol. 1, pp. 47-48, and Vol. 3, pp. 10-11.

limited adjustments that may be effected by applying judicially established rules of equity, the solution of such conflicts is not within the powers of the courts.

Conflicts of this sort occurring between States are currently described as "political" and "non-justiciable." They have been generally regarded as unsuitable for adjudication in the strict sense. Efforts have been made to provide for their settlement by conciliation commissions, and elaborate procedures of conciliation have been laid down in many bilateral and multilateral treaties.⁹ The fact is, however, that these procedures have almost never been used, and experience shows that it is a dangerous illusion to assume that the problem of "political" disputes has been disposed of once we have elaborated a network of agreements for peaceful settlement.

The method adopted in Articles 15 and 17 of the Covenant of the League of Nations fared little better. The Council and Assembly, active political bodies authorized to deal "with any matter . . . affecting the peace of the world,"¹⁰ were, unlike the specialized conciliation commissions, frequently appealed to; but their failure in cases where a large State had an active interest is notorious. Clearly what was wanting in the League system was the power to impose a decision which even an overwhelming majority of the member-States considered equitable.

Ultimately the problem of effective settlement is thus inseparable from the problem of power. Yet, short of the monopoly of force in an organized community of States which this implies, something may be done to reduce the occasions of war by expediting and reinforcing the processes of international legislation. These processes, necessary even in the most powerfully organized community, afford an avenue of peaceful evolution and avoid accumulating bitterness by removing the causes of conflict. One difficulty is that the very words "international legislation" frighten people. "International administration," on the other hand, is regarded as comparatively innocuous. The way of progress may therefore be to encourage the handing over of matters of common concern to international administrative agencies. In some fields of great importance to the general welfare it has been found possible by this method not only to short-circuit the slow and uncertain processes of ratification, but even to introduce majority decision.¹¹

The current demand for internationally coördinated policy and action in the post-war economic sphere, to ensure fuller use of resources and a wider distribution of wealth, may lead to nothing more than diplomatic agreements. If so, we can confidently expect a return to economic nationalism. The stabilization of exchange, the stimulation and regulation of international capital movements, the reduction of tariff and other barriers to trade,

⁹ See, *e.g.*, Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931).

¹⁰ Articles 3 and 4 of the Covenant.

¹¹ Riches, *Majority Rule in International Organization* (1940).

and the international commodity controls, for which many economists are now pleading, will require joint agencies with considerable autonomy. Those agencies will need power to make decisions binding on States, and it is to be hoped that they may even have some means of inducing compliance.

It may be that there is more prospect of development along these lines for economic than for political adjustments between States. Yet the demand for armaments control, for instance, is as vocal and insistent as that for freer international trade. Here again we must reckon with the need for quick decision and decisive action. In both fields it is safe to predict that the margin between mere administration and action of a legislative character will have to be slurred. The questions raised for the lawyer are those of majority-decision by international agencies, the extended use of old forms (administrative agreements, declarations, etc.), or the invention of new ones, that permit escape from the paralyzing delays of ratification, and the adjustment of national legal doctrine or institutions to these changing requirements.

In spite of the long experience we have had of international administrative agencies, their legal status is still far from uniform or settled. Relatively little thought has been given to the question whether they are to be regarded as corporate entities and, if so, whether under municipal or international law. In three cases, namely, the Bureau of Weights and Measures, the Office de Santé, and the Bank for International Settlements, personality has been conferred by the *lex loci*. In 1931, the Italian Court of Cassation held that the International Institute of Agriculture was an international person, and "an autonomous union free, as regards its internal affairs, from interference by the sovereign power of the States comprising the Union," and this notwithstanding the absence of any clause to that effect in the Convention of June 7, 1905.¹² Whether or not other national courts would take a similar view is pure conjecture. There is no settled doctrine on the matter either in international law or in the conflict of laws, and the multitude of legal questions which are thus left unanswered was revealed by Neumeyer in his Hague lectures on "*Les Unions Internationales*."¹³

The Bank for International Settlements marked a step forward. The committee of six lawyers who met in Brussels in December, 1929, proposed the following draft: "The parties recognize that the Bank for International Settlements will, from and after the date of its establishment, possess the

¹² Rapisardi-Mirabelli, "*Théorie Générale des Unions Internationales*," Hague Academy, *Recueil des Cours*, Vol. 7 (1925), II, p. 376, and Lauterpacht, *Annual Digest of Public International Law Cases*, 1929-1930, pp. 413-415. A good general study of the subject is Rapisardi-Mirabelli's later work, *Il Diritto Internazionale Amministrativo*, in Fedozzi, *Trattato di Diritto Internazionale*, Vol. VIII, Padova, 1939.

¹³ *Revue de droit international, de sciences diplomatiques, politiques et sociales*, Geneva, Vol. 2 (1924), pp. 356-362.

quality of an international body corporate.”¹⁴ This proposal did not find its way unaltered into the final texts; but in the Hague Agreement on German Reparations, January 20, 1930, Article 6, the Governments of Germany, Belgium, Great Britain, Canada, Australia, New Zealand, South Africa, India, France, Greece, Italy, Japan, Poland, Portugal, Rumania, Czechoslovakia, and Yugoslavia “recognize the corporate existence of the Bank to take effect as soon as it is constituted in accordance with the statutes annexed to the law incorporating the Bank.” On the same day the Swiss Federal Government undertook, in an agreement with the Governments of Germany, Belgium, France, Great Britain, Italy, and Japan, to grant the bank a constituent charter, which it bound itself not to alter. The bank was duly incorporated under Swiss Federal law on February 25, 1930, and, by virtue of the act of incorporation, of the various agreements of January, 1930, and of subsequent grants by several other States, it enjoys extensive immunity from taxation and seizure of assets.¹⁵ It is thus in the curious position of being incorporated by statute of one State but in certain important particulars exempt from the ordinary law of that and other States. The meaning of the recognition of “corporate existence” is doubtful. Quite apart from such specific agreement, national legal systems normally recognize the personality of foreign corporations. The signatory governments, in rejecting the draft of the committee of lawyers, clearly showed their unwillingness to admit an international law of incorporation.

Has the time come for the establishment of such a law? To answer that question satisfactorily—and the successful operation of the proposed new agencies of international coöperation may depend on the answer—it would be necessary to examine the experience of existing agencies in order to determine how far, if at all, they have been handicapped by ambiguities in their status. Such examination might lead to negative results. On the other hand, it might reveal not only a need for recognized international incorporation, but for a new body of principles to determine the law applicable to the transactions of international bodies corporate,¹⁶ and possibly for new developments in international judicial organization to exercise jurisdiction over them.

It is coming to be regarded as axiomatic that the pre-war trend towards direct participation of governments in international trade, accelerated and universalized in the course of the war itself, will not go into immediate reverse with the cessation of hostilities. Moreover, even if certain States relinquish a large part of their present direction of exports and imports, other State monopolies will in all probability continue. Trade between free and

¹⁴ Quoted by Sir John Fischer Williams in “The Legal Character of the Bank for International Settlements,” this JOURNAL, Vol. 24 (1930), pp. 670–671.

¹⁵ Texts in Hudson, *International Legislation*, Vol. V, pp. 135–335.

¹⁶ Cf. Hudson, “The Bank for International Settlements,” this JOURNAL, Vol. 24 (1930), p. 566.

THE SETTLEMENT OF MEXICAN CLAIMS ACT OF 1942

BY HERBERT W. BRIGGS

Of the Board of Editors

With the enactment on December 19, 1942, of the misnamed "Settlement of Mexican Claims Act of 1942,"¹ American nationals with claims based upon the international responsibility of Mexico for acts or omissions in contravention of international law appear likely to receive long-delayed satisfaction. Some of the claims are more than 60 years old. Awards were made by the United States-Mexican General Claims Commission in favor of some of the claimants more than 15 years ago, but to date no money has been paid to the beneficiaries of these awards. Various factors appear to have made this claims arbitration one of the most dilatory, inefficient, and unfortunate in our history. Claimants were notoriously lax in presenting evidence to the State Department,² although in some cases they appear to have been hindered by the Mexican Government from obtaining necessary evidence in Mexico. The preambles to three conventions extending the life of the General Claims Commission allege that "it now appears" or "it has been found" that the Commission could not hear, examine, and decide the claims within the time limit fixed; but Judge Fred K. Nielsen, American Commissioner on that court, has pointed out with some vigor that it was not the Commission, so much as the failure of American counsel and the Department of State, to prepare cases for presentation to the Commission, which caused the delay and paucity of decisions.³ Resignations of Commissioners, protracted delays in replacing them, antagonisms between Commissioners, and lack of coöperation by the Mexican Government were other factors contributing to the 19-year delay in effecting a settlement.⁴

Since the Settlement of Mexican Claims Act of 1942 is primarily concerned

¹ Public No. 814, 77th Cong., 2nd Sess. S. 2528, Congressional Record, Vol. 88, pp. 9710-9713, 9748, 9814, 9840 (daily edition, Dec. 8, 11, 14, 1942). Cf. also Claims of American Nationals Against Mexico. Hearings before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 77th Cong., 2nd Sess. on S.2528, June 30, July 1, 2, 6, 10, and 14, 1942. (Hereafter cited as *Hearings*.)

² Cf. the statement of Mr. Benedict M. English, Assistant Legal Adviser, Department of State, before the Senate subcommittee, July 14, 1942: "Despite the fact that the general claimants had some 12 years in which to file their evidence, it is now proposed to open up the matter again and to give claimants who had 12 years in which to file their evidence and who were repeatedly requested and begged to file evidence but who failed to file it, still another opportunity to file, thus probably jeopardizing the interests of the claimants who were diligent and who filed their evidence." *Hearings*, pp. 142-143. Cf. also information to same effect from Department of State, quoted by Hon. Sol Bloom in the House of Representatives, Nov. 24, 1942. Cong. Rec., Vol. 88, p. 9415 (daily ed.). It has been pointed out, however, that the Commissions and an American Agent directing the gathering of evidence were active during only six or seven years.

³ *Hearings*, pp. 34-37, 216 ff.

⁴ Cf. A. H. Feller, *The Mexican Claims Commissions, 1923-1934* (1935), p. 56 ff.

with the so-called "general claims" and "agrarian claims," it will be well to recall briefly the intricate history of attempts to settle them. On September 8, 1923, the United States and Mexico agreed to set up a three-man commission, known as the General Claims Commission, to decide claims arising since 1868 (other than those arising from Mexican revolutions) of American citizens against Mexico and of Mexican citizens against the United States.⁵ For reasons mentioned above, the original three-year lease of life of the Commission was extended to August 30, 1931, when its functions terminated.⁶ At that date, according to Feller, 2,781 American claims, amounting to \$513,694,267.17, had been filed against Mexico, 50 of them had been disallowed or dismissed, and 89 awards, amounting to \$4,607,-926.59, had been made; 836 Mexican claims, amounting to \$246,158,395.32, had been filed against the United States, 4 of them had been disallowed or dismissed, and 5 awards, amounting to \$39,000 had been made.⁷ Subsequent to this date the United States and Mexico signed a Convention on June 18, 1932, retroactively extending the life of the defunct General Claims Commission from August 30, 1931, to (in the event) February 1, 1937,⁸ but no further decisions were made by the Commission.⁹

The Underwood "Appraisals." In the meantime, by a Protocol signed April 24, 1934, the two governments, stating that it was inexpedient to proceed with the arbitration of the undecided claims and that an *en bloc* settlement was premature, agreed that each should appoint a national commissioner to "appraise" the claims of both governments and that the two national commissioners should later meet to reconcile their appraisals. It was further agreed that, upon the basis of the agreed appraisals by the national commissioners, the two governments would conclude a new convention either in the form of an *en bloc* settlement or "an agreement for the disposition of the claims upon their individual merits." Appraisals which the two commissioners were unable to reconcile were to be referred by a subsequent agreement (which never materialized) to an umpire for final decision.¹⁰

⁵ Cf. U. S. Treaty Series, No. 678.

⁶ *Ibid.*, Nos. 758 and 801.

⁷ Feller, *op. cit.*, p. 60. For the decisions of the General Claims Commission, cf. three volumes published by the U. S. Government Printing Office: Claims Commissions, United States and Mexico. Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico. February 4, 1926, to July 23, 1927 (G.P.O., 1927); September 26, 1928, to May 17, 1929 (G.P.O., 1929); October, 1930, to July, 1931 (G.P.O., 1931).

⁸ Cf. U. S. Treaty Series, No. 883. This convention extended the duration of the Commission two years from the date of the exchange of ratifications. The United States delayed ratification, with the result that the exchange of ratifications and the coming into force of this convention did not take place until Feb. 1, 1935, almost three and one-half years after the Commission had ceased to function.

⁹ The last decisions of the General Claims Commission are dated July —, 1931. Opinions of Commissioners (cited), 1931.

¹⁰ Cf. U. S. Executive Agreement Series, No. 57. This agreement was originally pub-

Operations under the Protocol of April 24, 1934, appear to have been even less happy than those under the original Convention of September 8, 1923. The American Commissioner, Mr. Oscar Underwood, Jr., and the Mexican Commissioner, Mr. Benito Flores, discussed some of the claims but the exact number of appraisals agreed upon by them has not been released. Nevertheless, Mr. Benedict English, Assistant Legal Adviser, Department of State, informed a Senate subcommittee on June 30, 1942, that appraisals agreed upon by Underwood and Flores "would total possibly somewhere around 110 claims, both Mexican and American, in which they agreed awards should be entered, and would include about possibly 1,000 claims that they agreed should be dismissed."¹¹ Apparently the two Commissioners agreed upon only about 36 awards in favor of American claimants.¹²

Whether because the terms of the Commissioners had expired or because of an "extreme reticence" on the part of the Mexican Commissioner,¹³ the two Commissioners, "without completing their work, made a 'joint report' (October, 1937) to the State Department of the claims agreed upon and the claims dismissed by agreement of the two agents, including a list of the claims discussed but not agreed upon and of the claims not discussed without any reasons being appended."¹⁴ Nevertheless, Mr. Underwood proceeded alone to appraise the unagreed American claims against Mexico, subsequently informing the Secretary of State that he had written opinions "in all of the active cases, 1,386 in number," stating "the reasons of fact or of law which actuated me in determining meritorious or not meritorious all of the claims."¹⁵ With a few exceptions, claimants and their lawyers were kept in ignorance of the Underwood appraisals of their claims. This policy was justified by the State Department on the ground that the Underwood appraisals were in no sense binding adjudications under the protocol. On March 1, 1940, Secretary of State Cordell Hull wrote to Senator Lundeen of these appraisals:

lished by the Department of State in 1934 as Publication No. 601: "General Claims. Protocol between the United States of America and Mexico, Signed April 24, 1934, Effective April 24, 1934." In 1935 it was reprinted as Publication 709 with a statement that it had been "Ratified by the President of the United States, January 14, 1935. Ratified by Mexico, November 23, 1934. Ratifications exchanged at Washington, February 1, 1935." There is no indication that the agreement was ever submitted to the Senate for its advice and consent, and, despite its ratification by the President, it was republished as a "Revised Print, Superseding Publication No. 601" in the Executive Agreement Series rather than in the Treaty Series.

¹¹ Hearings, p. 27. Unofficial estimates have placed the number of claims submitted for dismissal as "worthless" or "unproven" by agreement of the American and Mexican agencies, and consequently dismissed by the two Commissioners, as high as 1,500.

¹² Hearings, pp. 21, 82, 228. Statements of F. K. Nielsen and L. H. Woolsey.

¹³ Cf. Cong. Rec., Vol. 88, pp. 9419, 9420, 9655 (daily ed., Nov. 24, Dec. 4, 1942).

¹⁴ Hearings, p. 229. Statement of Mr. Lester H. Woolsey.

¹⁵ As quoted by Mr. Benedict English. Hearings, p. 14.

The *memoranda* prepared by the American Commissioner were for use by him in connection with the arbitration and possibly by the Department in connection with later consideration of the claims. Since they have not been made public and the *claims are still pending unadjudicated*, I regret that I am not in a position to furnish claimants with a copy of the *memorandum* he may have prepared in connection with any particular claim.¹⁶

Equally explicit was the statement of Mr. Benedict English, Assistant to the Legal Adviser, Department of State, before the Senate subcommittee conducting hearings on these claims, that "It is not the position of the Department that these appraisals are final and binding"; that they were "not an adjudication under the protocol, or under any act of Congress"; and that they are simply "the opinions of the American Commissioner as to what disposition should be made of the cases on which he and the Mexican Commissioner did not agree."¹⁷ Since, however, the Underwood appraisals were later used by the United States in calculating the amount which should be paid by Mexico to the United States in an *en bloc* settlement, an attempt was subsequently made to transform Mr. Underwood's memoranda retroactively into final adjudications,¹⁸ without disclosing the memoranda either to the claimants or to Congress.

Agrarian Claims: The Lawson "Determinations." Before discussing the 1941 treaty or the 1942 law, reference should be made to the "agrarian claims," *i.e.*, claims based on American-owned agrarian properties expropriated by Mexico. The history of attempts to settle these claims is curiously involved. By a Protocol of June 18, 1932, the United States and Mexico agreed that "agrarian claims now pending before the General Claims Commission" would be discussed informally by the two governments, and "pending such discussion no agrarian claims will be presented to the Commission for decision, but memorials of cases not yet memorialized may be filed in order to regularize the awards of the Commission made upon the agreed adjustments."¹⁹ The Protocol of April 24, 1934, similarly set aside these claims for special treatment and stated that, pending the contemplated discussions between the two governments, "no agrarian claims will be presented" to Commissioners Underwood and Flores, or to the umpire envisaged by that protocol.²⁰ Nevertheless, Mr. Underwood apparently proceeded alone to make appraisals of these agrarian claims.²¹

Agrarian claims arising subsequent to August 30, 1927 (and therefore

¹⁶ As quoted by Mr. Lester H. Woolsey. Hearings, p. 81. Italics supplied by Mr. Woolsey.

¹⁷ Hearings, pp. 82, 83.

¹⁸ Hearings, pp. 14, 82, 142.

¹⁹ The Protocol of June 18, 1932, which accompanied the signature of the Convention of June 18, 1932 (Treaty Series, No. 883) for the extension of the duration of the General Claims Commission, has not been published in either the Treaty Series or the Executive Agreement Series. Feller, *op. cit.*, pp. 338-340, prints it with a note: "Text furnished by Department of State." Cf. also his comments, *ibid.*, pp. 60-63.

²⁰ U. S. Ex. Agr. Series, No. 57: First recital.

²¹ Hearings, p. 81.

ineligible for presentation to the General Claims Commission), were the subject of a special agreement. By an exchange of notes signed November 9/12, 1938, the United States and Mexico agreed that the values of American-owned agrarian properties expropriated by Mexico since August 30, 1927, be "determined" by a commission to be composed of one representative of the Mexican Government and one of the United States Government, and, in case of disagreement, by a third person; that, subsequent to the "determinations," the two governments "will reach an agreement" as to the amount to be paid by Mexico; and that, commencing May 31, 1939, Mexico will pay at least \$1,000,000 annually on account.²² It was clearly contemplated that the national commissioners should meet, deliberate, and make "joint determinations," but there is no indication that the stipulated procedure was followed. Instead, Mr. Lawrence Lawson, the American Commissioner, proceeded to make his own "determinations" of about 350 agrarian claims arising between August 30, 1927, and July 31, 1939.²³

The Claims Convention of November 19, 1941. The subsequent agreements contemplated by the Protocol of April 24, 1934, and by the Agrarian Claims Agreement of November 9/12, 1938, were never negotiated because they were to have been based upon agreed appraisals (and decisions of unagreed appraisals by a third party) which, with a few exceptions, never materialized. However, partially on the basis of the unilateral Underwood appraisals and the Lawson determinations, the United States and Mexico negotiated in 1941 an *en bloc* settlement of "certain unsettled claims of the nationals of each country against the government of the other country."²⁴ By Article I, Mexico agrees to pay the United States \$40,000,000 (U. S. currency) as the balance due in full settlement of the following claims: (a) all claims filed by either government with the General Claims Commission established by the Convention of September 8, 1923; (b) all agrarian claims of American nationals against Mexico, which arose subsequent to August 30, 1927, and prior to October 7, 1940; and (c) property claims arising between January 1, 1927, and October 7, 1940 "involving international responsibility of either Government towards the other Government as a consequence of damage to, or loss or destruction of, or wrongful interference with the property of the nationals of either country." By Article II, the

²² U. S. Ex. Agr. Series, No. 158, containing notes exchanged Nov. 9 and 12, 1938, and April 17 and 18, 1939. Cf. also Compensation for American-Owned Lands Expropriated in Mexico. Full Text of Official Notes, July 21, 1938, to November 12, 1938. Department of State, Inter-American Series 16.

²³ Hearings, pp. 74, 187. Statements of Mr. Benedict English. Mr. Lawson's determinations have been praised as methodical, painstaking, objective, and impartial by an official of the Department of State. Cf. Hearings, p. 144.

²⁴ U. S. Treaty Series, No. 980. Claims Convention between the United States and Mexico, signed Nov. 19, 1941. Ratifications exchanged, April 2, 1942. Cf. this JOURNAL, Vol. 36 (1942), Supp., p. 179. For discussion in the Senate in giving its advice and consent, cf. Cong. Rec., Vol. 88, pp. 860-864 (daily ed., Jan. 29, 1942).

two governments agree that certain claims are not extinguished by the Convention, namely, the American oil claims;²⁵ certain defaulted Mexican bond claims of American nationals; certain Mexican claims; personal injury claims of nationals of either country arising between January 1, 1927, and November 19, 1941; and agrarian or property claims arising subsequent to October 7, 1940.²⁶ With the exceptions mentioned in Article II, the two governments "reciprocally cancel, renounce, and hereby declare satisfied all claims, of whatsoever nature, of nationals of each country against the Government of the other, which arose prior to the date of the signing of this Convention, whether or not filed, formulated or presented, formally or informally, to either of the two Governments." (Article III.)

Mexico paid \$3,000,000 on the exchange of ratifications and was credited with an additional \$3,000,000 previously paid under the agrarian claims agreement of November 9/12, 1938. The balance of \$34,000,000 is to be paid in annual instalments of not less than \$2,500,000 (Article IV).²⁷

Settlement of Mexican Claims Act of 1942. On May 14, 1942, President Franklin D. Roosevelt transmitted to Congress a recommendation of the Secretary of State enclosing a draft bill providing for the domestic allocation of funds received from Mexico under the 1941 Claims Convention.²⁸ The hearings on this draft bill before the House of Representatives Committee on Foreign Affairs appear to have been completely inadequate,²⁹ but serious objections were raised to the State Department bill at hearings conducted by a subcommittee of the Senate Committee on Foreign Relations, under the chairmanship of Senator Elbert D. Thomas of Utah. The feature of the State Department draft³⁰ which aroused most opposition was the proviso in Section 3 that the secret Underwood appraisals and Lawson deter-

²⁵ The oil claims are the subject of a special agreement signed the same day (Nov. 19, 1941) as the Claims Convention. Cf. U. S. Ex. Agr. Series, No. 234: Expropriation of Petroleum Properties.

²⁶ Art. II continues that except for the oil and bond claims, the claims excepted in Art. II "will be the subject of future agreements which the two Governments will conclude as soon as possible."

²⁷ The first annual instalment of \$2,500,000 was paid in 1942. Cf. Department of State Bulletin, Vol. VII, No. 179 (Nov. 28, 1942), p. 968. The fund available for American claimants will include not only the amount paid by Mexico but will be supplemented by \$533,658.95 "which is an amount equal to the awards and appraisals on claims of Mexican nationals against the United States," and which is appropriated by Sec. 8 (b) (4) of the 1942 Act. Cf. Senate Report No. 1615, 77th Cong., 2nd Sess.

²⁸ Cf. House Document No. 722, 77th Cong., 2nd Sess. The correspondence and draft bill are reprinted in Hearings, pp. 205-210.

²⁹ Cf. Cong. Rec., Vol. 88, pp. 9416, 9418-9419 (daily ed., Nov. 24, 1942).

³⁰ Mr. Benedict English of the State Department objected to the characterization of the bill as "an administration measure" or "a State Department project" (Hearings, pp. 139-143), but in the House of Representatives on Nov. 24, 1942, Mr. Luther A. Johnson of the House Committee on Foreign Affairs stated that "this bill was drafted by the legal department of the State Department and by the legislating [sic.] drafting branch of the House." Cong. Rec., Vol. 88, p. 9422. Cf. also, *ibid.*, p. 9410.

minations should be blanketed in as final and binding decisions without appeal, or, indeed, without ever having been adjudicated on the basis of any treaty or statute. Objections were also raised that the appraisals had been made on the basis of only partly pleaded claims and that the summary procedure of the Protocol of April 24, 1934, had excluded important evidence³¹ (quite aside from the fact that this protocol had not authorized "decisions" by the American Commissioner, sitting alone). It was further argued that Sections 5 and 10 of the State Department draft were objectionable in providing for two new one-man commissions with authority limited to the decision of certain claims which had neither been decided nor appraised, instead of creating a three-man commission with authority both to decide the new claims and to hear appeals from appraisals.

As a result of the Senate subcommittee hearings and some very able work by Senator Elbert D. Thomas, a much improved bill passed the Senate on October 1, 1942,³² but on November 24 the House of Representatives passed the State Department draft practically in the form submitted by the Secretary of State.³³ Two conference committees were required (and a brief filibuster in the Senate), before the House yielded and accepted a slightly modified Senate draft on December 8, 1942.³⁴

The Settlement of Mexican Claims Act of 1942 provides for the establishment of a domestic American Mexican Claims Commission to be composed of three persons.^{34a} Within a period of two years the Commission is authorized to examine and render final decisions in eight categories of claims of American nationals against the Government of Mexico. All decisions are to be in accordance with the applicable provisions of the General Claims Convention of September 8, 1923, the Special Claims Convention of September 10, 1923, or the Agrarian Claims Agreement of November 9/12, 1938, or, if not within their purview, "in accordance with the applicable principles of international law, justice, and equity." (Section 5.)

³¹ Cf. Statement of Mr. L. H. Woolsey, Hearings, pp. 81, 229.

³² Cf. Cong. Rec., Vol. 88, pp. 7921-7923 (daily ed., Oct. 1, 1942).

³³ *Ibid.*, pp. 9409-9428 (daily ed., Nov. 24, 1942). Cf. also the statement of Senator Bennett Champ Clark of Missouri that the House "passed a bill simply striking out all after the enacting clause of the Senate bill and inserting a canned bill, sent up here by some clerk or assistant in the State Department, which he himself had abandoned before the Committee on Foreign Relations. He was present when we adopted the amendment, and raised no objection, then slipped over to the House and got the House to strike out all after the enacting clause of the Senate bill and take this canned bill, which was sent up from the State Department for the purpose of shutting off all these claimants, and was passed by the House in that form." *Ibid.*, pp. 9659-9660 (daily ed., Dec. 4, 1942).

³⁴ For the text of the 1st Conference Report, cf. Cong. Rec., Vol. 88, pp. 9543-9546 (Dec. 2, 1942); adopted by House, *ibid.*, p. 9615 (Dec. 3, 1942); debated in Senate, *ibid.*, pp. 9652-9663 (Dec. 4), 9672-9685 (Dec. 7); 2nd Conference Report adopted by Senate, *ibid.*, pp. 9710-9713; by House, *ibid.*, pp. 9737-9740, 9748 (Dec. 8, 1942).

^{34a} The members of the American Mexican Claims Commission are Edgar E. Nitt, of Texas, Samuel Marshall Gold, of New York, and Charles F. McLaughlin, of Nebraska. Cf. Cong. Rec. (March 1, 1943), Vol. 89, p. 1456.

The categories of claims to be decided by the Commission comprise (Section 3 (a)): (1-3) three categories of agrarian claims arising between January 1, 1927, and October 6, 1940, inclusive, and not previously filed with the General Claims Commission or the Agrarian Claims Commission (prior to July 31, 1939); (4) all other *property* claims arising between January 1, 1927, and October 6, 1940, inclusive, involving the international responsibility of Mexico (except the oil and bond claims mentioned in the 1941 Claims Convention); (5) claims or parts of claims which were filed with both the General Claims Commission and the Special Claims Commission and not yet adjudicated finally upon their merits; and (6) "Any claim in which a decision was not rendered by the General Claims Commission in conformity with the rules of procedure adopted by such Commission."³⁵ Except for the 6th category, all claims comprised in Section 3 (a) are to be decided upon the basis of evidence and written legal contentions presented to the Commission and upon the results of any independent investigation the Commission may make (Section 3 (c)).

In addition to the six categories of claims specified in Section 3, the Commission is authorized (Section 4), in its discretion, to review the Underwood and Lawson appraisals, provided any claimant, after receiving "notice"³⁶ of the appraisal made in his case, petitions for review. This excellent provision allows any claimant to accept an appraisal in his favor as a final award, but gives claimants who are dissatisfied their first opportunity for an adjudication of their claims. In rendering decisions upon reviewed appraisals, the Commission (stipulates Section 4 (d)) shall decide upon the basis of evidence before the Commissioner at the time of the original appraisal and written evidence submitted with the petition for review, but, in its discretion, the Commission may receive additional evidence in those cases in which the Commission is satisfied that certain circumstances made it impossible for claimant to obtain and file such evidence.³⁷

By Section 6 of the Act "the following determinations heretofore made with respect to claims on behalf of American nationals against the Govern-

³⁵ Sec. 3 (a) (6) permits the rehearing of the Dickson Car Wheel Co. Claim (Docket No. 1074) and the International Fisheries Co. Claim (Docket No. 625), which Commissioner Fred K. Nielsen pointed out, in dissenting, were not rendered in conformity with the rules of procedure of the General Claims Commission. *Opinions of Commissioners* (1931), pp. 206, 286. Cf. also Feller, *op. cit.*, p. 59. Sec. 3 (a) (6) will thus permit the rehearing of a case involving the validity of a Calvo clause. In the draft of S. 2528 which originally passed the Senate (Oct. 1, 1942) was a proviso (Sec. 3 (a) (7)) which would have authorized a rehearing of the North American Dredging Co. Claim (Docket No. 1223) in which the United States had filed a motion for a rehearing by the General Claims Commission, but this proviso was deleted in conference. Cf. also, *Hearings*, p. 56.

³⁶ Presumably the "notice" would include a copy of the appraisal and the reasons therefor, although the Act does not so state.

³⁷ The circumstances referred to probably include a Mexican decree or constitutional provision allegedly penalizing by loss of citizenship any Mexican who aided an alien in establishing any claim against the Mexican Government. Cf. *Cong. Rec.*, Vol. 88, pp. 9419 (Nov. 24, 1942), 9657, 9659, 9661 (Dec. 4).

ment of Mexico" are to be regarded as final and binding: (1) the 139 decisions rendered by the General Claims Commission, except those not rendered in conformity with its rules of procedure; (2) appraisals agreed upon jointly by Commissioners Underwood and Flores in conformity with the 1934 Protocol; (3) Mr. Underwood's unilateral appraisals, except where such appraisals are reviewed by the American Mexican Claims Commission pursuant to Section 4 of this Act; (4) Mr. Lawson's unilateral appraisals, except where similarly reviewed. There would seem to be no objection in principle to these provisions in so far as claimants are willing to accept appraisals in lieu of an adjudication, although the objection was advanced at the Senate subcommittee hearings that, since the \$40,000,000 *en bloc* settlement was made upon the basis of the Underwood and Lawson appraisals, any later allowance of claims disallowed by Underwood or Lawson would decrease *pro rata* the funds available to other claimants.³⁸ The force of this argument made by holders of awards by the General Claims Commission is lessened when it is recalled that the other claimants have had no similar adjudication.

With reference to payments, the Act provides (Sections 8 and 9) that, out of funds already paid³⁹ by the Mexican Government to the United States Government, claimants in favor of whom awards were made by the General Claims Commission, claimants who are beneficiaries of agreed appraisals by Commissioners Underwood and Flores, and claimants who accept or fail to ask reviews of the unilateral appraisals by either Commissioner Underwood or Commissioner Lawson shall be paid not more than 30% of their awards or appraisals, exclusive of interest. As funds are available from Mexico, similar payments of not more than 30% are to be

³⁸ At the Senate subcommittee hearings, Mr. Benedict English said: "The point is that there is only so much money to be distributed, and the greater the number of claims let in the thinner the fund must be spread." Hearings, p. 142. In this connection, it should be mentioned that the American Mexican Claims Commission will have jurisdiction to decide about 60 claims which had been filed with both the General Claims Commission and the Special Claims Commission (set up by the Convention of Sept. 10, 1923, U. S. Treaty Series, No. 676), and which Commissioner Underwood had decided were "special" claims, too late for decision by the domestic Special Mexican Claims Commission set up by Act of Congress approved April 10, 1935 (49 Stat. 149). These claimants who receive awards by the American Mexican Claims Commission will therefore be paid from the "general claims" fund set up by the 1942 Act rather than the "special claims" fund previously set up. For the history and decisions of the "special claims" based upon revolutionary damage in Mexico, cf. Feller, *op. cit.*; Hearings, pp. 6-16, 38-43, 65-69, 81; Special Claims Commission, United States and Mexico, Opinions of Commissioners (1931); Special Mexican Claims Commission under the Act of Congress Approved April 10, 1935: Report to the Secretary of State, with decisions . . . (1940) (Department of State Arbitration Series 7).

³⁹ In 1940 an attempt had been made in Congress to have the United States Government pay to American claimants the amounts awarded to them by the General Claims Commission, since Mexico had not paid any of the awards against her. The bill (S. 326) was quite properly defeated, in the House of Representatives. Cf. Cong. Rec., Vol. 86, particularly pp. 6450-6463, 9293-9303, 12120.

paid to claimants who receive awards by decision of the American Mexican Claims Commission established under the Act of 1942. Subsequent payments will be paid *pro rata* as funds are available from Mexico. Each payment referred to above is subject (Section 10b) to a deduction of 5% to reimburse the United States for "expenses incurred." This last stipulation was criticized in the hearings before the Senate subcommittee on the ground that it was unfair to saddle on the awardees all expenses incurred by the United States since 1923 in connection with the claims.⁴⁰ The bill S. 2528 as it originally passed the Senate authorized only a deduction from the Mexican Claims Fund "equal to the expenses" of the Commission to be established by this Act. In conference, the two branches of Congress re-inserted the 5% provision of the State Department draft.

By the terms of the 1941 Claims Convention and the 1942 Act twelve more years may elapse before awards are paid in full; but the Convention has removed the claims as a source of international friction and the Act provides a method by which claimants will have as equitable consideration as could be expected in the circumstances.

It has been suggested that the method of *en bloc* settlement, particularly if coupled with a subsequent domestic adjudication of the individual claims, is preferable to the method of international arbitration. It is not clear to the writer whether the drafters of the 1941 Claims Convention had this in mind when they stated in the preamble that the two governments were "desirous of effecting an amicable, expeditious and final adjustment of certain unsettled claims . . . without resort to methods of international arbitration" previously agreed to. It should not be lightly assumed, however, on the basis of the United States-Mexican claims arbitration of 1923, that international arbitrations need be non-amicable or dilatory or that there is any peculiar virtue in avoiding the method of international adjudication for the settlement of claims of this type. The 1923 arbitration of general claims got off to a bad start because the convention which provided for it unhappily dispensed with the local remedies rule.⁴¹ This, and the short period available for filing claims, prevented the possibility of sufficient weeding-out by the State Department of vexatious claims, and undoubtedly added to its difficulties in preparing cases for submission to a commission which was required to decide claims on the basis of international law, justice, and equity.⁴²

Let us compare briefly the alternative methods of *en bloc* settlement and international arbitration. In both cases all claims of nationals of one state

⁴⁰ Hearings, pp. 17, 36-37, 89, 100. On May 20, 1940, a table was printed in the Congressional Record showing that Congress had appropriated \$3,405,000 for expenses in conducting the General and Special claims arbitrations from 1925 through 1938. Cf. Cong. Rec., Vol. 86, pp. 6459, 6461.

⁴¹ U. S. Treaty Series, No. 678: Art. V.

⁴² Feller, *op. cit.*, p. 57, points out that "the two governments proceeded figuratively to dump the contents of their claims files on the desks of the Commission."

against the government of the other should be presented to their own State Department. If the contemplated method of settlement is an international arbitration, it is sufficient for the State Department to weed out claims on their face invalid (*e.g.*, because of failure to comply with the local remedies rule) and to present to the international tribunal claims which appear *prima facie* to be grounded on international law. Whether international responsibility exists in a particular case will be decided by the tribunal on the basis of international law. If, however, the method of an *en bloc* settlement were generally to be followed, it would be inequitable to ask a foreign government to make payments on claims merely because the plaintiff government asserts that they appear *prima facie* valid to it. Nor is there any reason why national appraisals of the international responsibility of another government should generally be accepted by the latter. If, before the amount of an *en bloc* settlement is determined, agreed appraisals by the two governments are necessary, and if, in order to grant just consideration to claimants, a domestic tribunal is subsequently necessary in each country, it would seem that the traditional methods of international arbitration would in most cases be less dilatory and more satisfactory. Moreover, although decisions of domestic claims tribunals are not without value to international lawyers,⁴³ a jurisprudence evolved through decisions of international claims tribunals might be more useful in limiting the presentation of vexatious claims and in eliminating international friction.

No discussion of the *en bloc* settlement of American claims against Mexico would be complete without a reference to the larger deal of which this settlement was only a part. By the Claims Convention of November 19, 1941, Mexico obligated herself to pay \$40,000,000 to the United States at the rate of \$2,500,000 a year. By an agreement reached the same day the Mexican Government agreed to make a conditional payment of \$9,000,000, on account, as compensation for expropriated petroleum properties of American nationals. At the same time the United States obligated itself to set up a \$40,000,000 fund to stabilize the Mexican peso; to establish a preliminary \$30,000,000 credit through the Export-Import Bank to finance Mexican highway construction; and to purchase each month at an artificially high price some millions of ounces of newly mined Mexican silver.⁴⁴ While it might thus appear that the United States Government is financing the payment of claims by Mexico, the international responsibility of Mexico to pay for damage to American nationals has been accepted, and the claimants are in a position by the Settlement of Mexican Claims Act of 1942 to receive substantial justice—if one disregards the years of unconscionable delay.

⁴³ Cf. Robert R. Wilson, "Some Aspects of the Jurisprudence of National Claims Commissions," this JOURNAL, Vol. 36 (1942), pp. 56-76.

⁴⁴ Cf. "Agreements with Mexico," Department of State Bulletin, Vol. V, No. 126 (Nov. 22, 1941), pp. 399-403; remarks of Senator Vandenberg, Jan. 29, 1942, Cong. Rec., Vol. 88, pp. 862-863.

THE RECOGNITION OF LATVIA

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The process by which Latvia, Estonia and Lithuania attained legal sovereignty is typical and serves as an example of the process whereby other new States in post-war Europe came into being. There is no doubt that after World War II the important lessons presented by the Baltic case may be drawn upon in planning future European international relations.

The territory of Latvia, which formerly belonged to Imperial Russia, was a theater of war up to the very time of its emancipation and was to a great extent occupied by Germany. Both Germany and Russia had within the borders of Latvia, as well as of Lithuania and Estonia, their "own" conational minorities who had resided there for hundreds of years. The German group, constituting 4-5% of the total population, had been in the Baltic countries for 700 years. As Teutonic knights, they were the explorers and conquerors of these countries, and had remained there as the dominating class of gentry and town patricians. The Russians, on the other hand, constituting 10% of the Latvian population, were made up chiefly of peasantry who resided in the border regions.

In World War I while the Germans were in military occupation of Latvia, especially after the collapse of the Russian Army (August 1917), the German minority during the short period of the democratic régime of the Provisional Government exerted all its efforts to bring about a union with Imperial Germany. This was sought on the basis of federative links.

In September 1917 a special Diet (*Landtag*) was convoked in Courland. The Diet was elected on the basis of corporative ballots, the preponderant majority of which consisted of representatives of Baltic barons and German higher middle class and a few assimilated pro-German Letts. It is no wonder then that this "parliament" was unanimous in favor of approving an address to be sent to the German Emperor begging him to take the country "under the protectorate and defense of His Majesty the German Emperor and the powerful German Reich." A similar resolution was adopted in December 1917 by the Town Council of Riga, the capital of the former old Province of Livonia, as well as by the gentry of Livonia.¹

Thus the future Latvian State was confronted with a double struggle: externally, against the two great Powers—Germany and Russia, and internally,

¹ Livonia is the eastern and northern part of Latvia bordering with Estonia. In the Middle Ages and afterwards the name "Livonia" was often used for the territory of the Livonian Order including, in addition to Livonia proper, Estonia and Courland with their surrounding districts.

against its "own" politically powerful German and Russian national minorities, which minorities were bolstered by Germany and Russia, more or less camouflaged in their background. In this paper we shall refer to those practical and political complexities of the question only in so far as they are revealed in clearly expressed and legally relevant documents, acts, pourparlers and conventions. We, therefore, shall omit numerous details pertaining to the political and social analysis of the emergence of Latvia as a State and shall not dwell upon the previous period of fifty years of the Lettish national movement.

It is noteworthy that the Letts did not make any special demonstration or formal claim for national self-determination, especially when they had every opportunity to do so during the time when the World War was raging and until the advent of the so-called democratic Kerensky Revolution in February 1917 (March 1917—according to the European calendar) and the collapse of the Russian monarchy. True, as early as the spring of 1915, the creation of special military units of "Lettish battalions" (*Latviesu Strelnieki*), which fought loyally in the ranks of Russian armies, was tantamount to the creation of a small Lettish national army, but the Russian Imperial Government was careful not to assume any obligations for the recognition of Latvian national aspirations. However, it was implicitly understood both by the Russian Government and the Lettish members of the Duma that some concession, in the nature of limited home rule, would be granted to the Letts when victory was achieved. In the solemn call to the Letts, under the escutcheon of Imperial Russia, the Russian Government did not undertake any formal political obligations—it was merely a call to arms against Germany, the common enemy of Russians and Letts.

As far as the Russian Government was concerned, it did not regard with serious suspicion any political intentions of the Letts. For, during the first Russian Revolution of 1905, the aspirations of the Letts never exceeded the modest request of teaching Lettish in the schools and of establishing some sort of cultural autonomy. The Polish and Finnish national movements had already begun to clamor for national independence as early as 1905, but not one Lettish political party—whether of the bourgeoisie or of the Social-Democrats—had ever asked for anything that would serve as a basic point of a program leading to the independence of Latvia. The same thing that has been said of Latvia can also be said of the Estonian and Lithuanian movements in 1905–1906.

During the war, and especially after the occupation of Courland (Western and Central part of Latvia) by the German Imperial Army, the Letts began to feel the danger of their disappearance, a real national *memento mori*. This fear can be better understood when it is remembered that Courland, for three hundred years before its annexation by Russia in 1795, had existed as a German-dominated Duchy, having its own external policy and its own colonial possessions all over the world, one of them as far as the island of

Tobago in the Caribbean Sea. If we couple this fact with the fact that the land-owning and hence the ruling class belonged to the strata of German nationality, then we can appreciate how the Lettish national movement was intensified. It is clear, therefore, that the very establishment of the Lettish battalions by the Russian Government constituted in the mind of the Lettish people a tacit recognition of Latvian home rule.

But these aspirations for home rule were not fully realized even after the outbreak of the democratic Russian Revolution in March 1917, and at the most the Letts attained only a regional political autonomy. It was the Kerensky Government which introduced regional councils (*Semski Soviet*)² for Courland and Livonia, both of which constituted the most important sections of Latvia. A similar council was established in Estonia (former Russian District of Estland). These regional councils were rather of the nature of purely territorial organs of local self-government of the whole population (among whom, in Latvia, the Letts were in the majority just as the Ests constituted the majority in Estonia). But let it not be assumed that they were public bodies of national representatives since they did not have the qualifications for attaining that national autonomy which was proclaimed as early as 1905. The Letts were especially concerned by the forceful expulsion of hundreds of thousands of their co-nationals into the interior of Russia, an expulsion which was carried out by the headquarters of the Imperial Russian Army.

During the period of the democratic government, Russia established the above mentioned councils for Courland, Livonia and Estonia for the purpose of bolstering up the weak position of the Baltic nations. The democratic government of Russia drew up a detailed statute for the protection of these national minorities, promoting the use of their language in the Russian courts and the establishment of administrative bodies and schools in Lettish. But before these laws could be completed and promulgated, the Communist Revolution broke out in November 1917.

It was under these extraordinarily difficult circumstances, when the danger of national disappearance or extirpation faced the Letts as a stark reality, and when the German soldiers who participated in the Baltic battles were promised that they would be permitted to colonize Latvia in great numbers and use the land that was fit for agricultural pursuits, that the national movement, at first moderate, was most violently accelerated among the Letts. They were no longer satisfied with mere autonomy or home rule and now clamored for full independence.

Having been expelled from their own homeland through the German occupation and having been compelled by the Russian anti-democratic Bolshevik

² The word "Soviet" means Council and is an old notion in Russian public and constitutional law. The Russian Upper House, under the Czarist régime, was called State "Council"—*Gosudarstvenny Soviet*. On the other hand, an organ of executive character was also called *Soviet Ministrov*, meaning Council of Ministers.

régime to follow a course of illegal underground activity, the leaders of the Lettish national movement convoked an informal National Council in Valk (a town on the borderline between Latvia and Estonia). This took place in November 1917. In this National Council all political factions were represented, except the extreme Communist leftist and pro-German rightist groups. This National Council adopted a resolution to address itself to the Allied Powers with the request for help in establishing an autonomous democratic State of Latvia, which would include Courland, the southern Lettish part of Livonia and the Lettish districts of the former Russian province of Vitebsk. A special committee for foreign affairs was appointed with unofficial headquarters in St. Petersburg, in which city the diplomatic agents of the Allied and neutral countries were still residing. Liaisons of a confidential nature were established with various embassies, especially with those of England and France. The Ambassador of France (Noulens) declared, on January 22, 1918, his sympathy with the aims of the Lettish National Council and promised that these aims would be taken into consideration at the coming peace conference. A similar statement was made by the British Chargé d'Affaires, Mr. Lindley, in St. Petersburg, on March 1, 1918. "Fight for an independent Latvia—I believe you will reach this goal,"³ said he.

What influenced the attitude of the Allied Powers with regard to the final recognition of Latvia *de jure* was the dual aspect and the somewhat dubious future of Latvia as well as of other Baltic States during the transition period. On one hand, the Allies wished to put an end to the further strengthening of Germany on the shores of the Baltic Sea, with such important harbors as Riga, Libau and Windau; on the other hand, the Allies wished to have the freedom to choose either to cede the territory of Latvia to new Russia or to recognize the independence of a Latvian State, depending upon the conditions which prevailed at that time. England and France had also to reckon with the opinion and influence of the diplomatic representatives of pre-Bolshevist Russia, who were still functioning in some countries, especially since, in England and France, a movement in favor of an undivided Russia was supported by many political circles. The prospects for such a movement were not clear. Moreover, Latvia, because of its geographic position and history, was predestined to be a natural buffer State against any possible German expansion, especially in the light of the 700-year-old history of German domination and social oppression in Latvia.

The negotiations of the representatives of Latvia assumed a favorable aspect. Germany then tried to enhance her occupation of the Baltic States by promoting fictitious quasi-parliamentary institutions within the framework of the occupied territory and by actually making these bodies proclaim

³ See J. Seskis, *Latvijas valsts izcelsanas* (The Emergence of the Latvian State), Riga, 1921, p. 46. The author was one of the most prominent Latvian diplomats and president of the Latvian delegation to the Peace Conference of Paris.

the "deliverance" of the populations—not mentioning clearly Letts in Latvia and Estonians in Estonia—from the yoke of the Russian Czars. This development was enhanced by the catastrophic events on the Russo-German front, which culminated in the Peace Treaty of Brest-Litovsk on March 3, 1918.⁴ According to this treaty, Russia withdrew her sovereignty from the entire territory of Latvia and part of the other Baltic States. The Brest-Litovsk Treaty did not cut off entirely Livonia and Estonia from Russia, but, after the ensuing expansion of occupation of the entire Baltic district, the United Landesrat of Livonia, Estonia, Riga and the islands of Oesel and Moon, decided to request the German Kaiser to give military protection to Livonia and Estonia and to support their complete severance from Russia. In this way, the creation of a special United Monarchical Constitutional Baltic State was proposed, which was to be united in a personal pact with Prussia.

In the meantime, the Lettish National Council, which had its second session in St. Petersburg, adopted a sharp protest against the division of Latvia, against peace treaties which contradicted the national self-determination of the Latvian nation, and against all schemes of the military and occupational authorities which falsified the national will of the Latvian people. Under the pressure of the steadily growing persecutions on the part of the Soviet Powers, the Third Session of the National Council (end of June 1918 in St. Petersburg) saw itself compelled to send a representative (S. Meierowitz) abroad, and to create a special bureau for foreign affairs in Stockholm.

On the 23rd of October, 1918, a meeting of historical importance took place in London between Meierowitz and the then British Minister for Foreign Affairs, A. J. Balfour. The important decision reached at this meeting was the granting to Latvia of *de facto* recognition. It was at this meeting that Balfour declared that the British Government had decided to recognize the National Council (or Assembly) as constituting the Government of Latvia, and that this was to be temporary pending the convocation of the peace conference. This verbal declaration was confirmed by a note, dated November 11, 1918, supplementing the declaration. According to this note, the British Government recognized the National Assembly as a *de facto* independent body and Mr. Meierowitz as the unofficial diplomatic representative of the Provisional Government of Latvia.

In this way diplomatic relations were established between England and the newly formed State of Latvia. Previous to that, Latvia had no diplomatic intercourse with any States. However, what is even more signifi-

⁴ Art. VI, par. 2, of the Peace Treaty of Brest-Litovsk reads as follows:

"Estonia and Livonia will likewise, without delay, be cleared of Russian troops and the Russian Red Guard. . . . Estonia and Livonia will be occupied by a German police force until security is ensured by proper national institutions and until public order has been established. Russia will liberate at once all arrested or deported inhabitants of Estonia and Livonia, and ensures the safe return of all deported Estonians and Livonians." Texts of the Russian "Peace" (U. S. Dept. of State, 1918, p. 13).

cant, as it pertains to the *de facto* recognition of Latvia on the part of England, is the fact that this recognition (shortly after the collapse of the German Army on the Western front) took place *before* the declaration of Latvia's independence was made public by the newly formed People's Assembly and the Provisional Government. This declaration, dated November 18, was worded as follows:

To the citizens of Latvia! The People's Assembly of Latvia, which considers itself to be the sole-bearer of the supreme power of the State of Latvia, declares herewith as follows:

1. Latvia, which unites within its ethnographic boundaries Courland, Livonia and Latgalia, is an independent democratic republican State. The constitution and the relationship to foreign States will be determined in the near future by a Constitutional Assembly, which will be elected by universal, direct, equal, and secret suffrage, by both sexes, according to the rules of proportional election.

2. The People's Assembly of Latvia has established the Provisional Government of Latvia as the supreme executive power of Latvia.

The People's Assembly of Latvia urges the citizens of Latvia to keep peace and order and to assist with all their power the Provisional Government of Latvia in its difficult and responsible task.

Prime Minister of the Provisional Government of Latvia—ULMANIS.

Representative for the President of the People's Assembly of Latvia—SEMGALS.

It was one month after Latvia proclaimed its independence that the Red Army of the Soviet Republics invaded Latvia. Riga fell, and the Provisional Government had to flee to Courland, where it was compelled to withdraw before the advancing enemy until the territory of the Provisional Government was confined to the small strip of land around the Baltic harbor of Liepaja (Libau). It was from this strip of land that it sought to regain its former territory; this was in June-July 1919. Later the Red Army, under pressure of the national Latvian army which was supported by the Allies, was obliged to retreat.

Foreign recognition is clearly recognizable in the creation of the State of Latvia with its constitutional form of government.

As already mentioned, the first *de facto* recognition of Latvia took place on November 11, 1918, by England. This was immediately after the collapse of the German Army and before the people of Latvia had had a chance to express their will as to the form of government they desired. As matters further developed, Latvia, which was solicitous for its own statehood, was more concerned about its foreign negotiations than its immediate domestic achievements.

The Versailles Peace Treaty, signed on June 28, 1919, and which went into effect on January 10, 1920, makes a further concession to Latvia, inasmuch as it elevates the *de facto* recognition of Latvia to a nearly universal act of international law. This is effected by Articles 116, 117 and 433 of the Peace Treaty. What is especially significant for the *de facto* recognition of the three Baltic States is the fact that this recognition is connected with certain legal consequences, in this case for Germany. Article 433 reads as follows:

As a guarantee for the execution of the provisions of the present treaty, by which Germany accepts definitely the abrogation of the Brest-Litovsk Treaty, and of all treaties, conventions, and agreements entered into by her with the Maximalist Government of Russia, and in order to ensure the restoration of peace and good government of the Baltic Provinces and Lithuania, all German troops at present in the said territories shall return to within the frontiers of Germany as soon as the Governments of the Principal Allied and Associated Powers shall think the moment suitable, having regard to the internal situation of these territories. These troops shall abstain from all requisitions and seizures and from any other coercive measures, with a view to obtaining supplies intended for Germany, and shall in no way interfere with such measures for national defence as may be adopted by the Provisional Governments of Estonia, Latvia and Lithuania.

The founding of the State of Latvia affords a good example of the importance of recognition in the attainment of statehood. Recognition is one of the most important prerequisites in the creation of a new State. As a matter of fact, such recognition precedes sometimes the actual domestic consolidation of the forces within the State and renders the greatest possible aid to the latter. Thus Articles 116, 117 and 433 preceded the establishment and consolidation of the Latvian Government: these took place only on July 14, 1919, *i.e.*, a month and a half *after* the peace treaty was signed and the *de facto* recognition of Latvia was proclaimed. This recognition was also decisive in subduing the local pro-German putsch of Niedra, which greatly endangered the creation of the national State. At the time when these articles declared and guaranteed the existence and the rights of the Provisional Government, this government was leading a very dangerous and precarious existence, for its power to decree was still hampered by conditions due to the putsch, and the country was not yet cleared of the remaining German occupational forces and the Russian Red Army, so that it could proceed only slowly in the strengthening of order and power. In this way, the *de facto* recognition was not merely a legal sanctioning of the *de facto* status, but it was a powerful impetus toward the creation of the State of Latvia.

After this recognition, a more secure support of the new State might have been offered by the Allied Powers. German power was finally broken in the entire Baltic region. Germany was compelled to evacuate Latvia in accordance with the Versailles Peace Treaties which actually had not gone into effect at that time. The complete evacuation of Latvia by German troops, marauders and hangers-on,—after the conclusion of the armistice with Germany on July 3, 1919—brought about in Latvia an internal political recovery and a tremendous strengthening of the State against the then weakly organized Red Army. Still there was a short period, *i.e.*, until the end of 1919, during which the last uprising of German-Russian invasion forces, led by General von der Goltz and afterwards by Bermond, had to be

overcome,⁵ and only in July and August 1920 could the war with both great Powers, Germany and Russia, be considered at an end.

The peace treaties with Germany and Russia further strengthened the juridical status of Latvia. In the meantime, help came from France, which decided on April 28, 1920, to recognize the *de facto* existence of the independent State of Latvia. This was the result of France's bitter experience of intervention in the Russian Civil War on the side of the opponents of the Soviet dictatorship. But it must be stated that this isolated *de facto* recognition added very little toward strengthening the situation after Articles 116, 117 and 433 of the Versailles Treaty had already been published.

The provisional convention regarding the resumption of relations between Latvia and the German Reich, dated July 15, 1920, reads *inter alia* as follows:⁶

Germany declares itself ready to recognize Latvia *de jure* as soon as one of the Allied Great Powers mentioned in the Peace Treaty of Versailles grants such recognition to Latvia. (Par. 2.)

Article 2 of the Peace Treaty between Latvia and Russia, dated August 11, 1920, reads as follows:⁷

By virtue of the principle proclaimed by the Federal Socialist Republic of the Russian Soviets which establishes the right of self-determination for all nations, even to the point of total separation from the States with which they have been incorporated, and in view of the desire expressed by the Latvian people to possess an independent national existence, Russia unreservedly recognizes the independence and sovereignty of the Latvian State and voluntarily and irrevocably renounces all sovereign rights over the Latvian people and territory which formerly belonged to Russia. . . . The previous status of subjection of Latvia to Russia shall not entail any obligation towards Russia on the part of the Latvian people or territory.

The achievement by Latvia of final recognition both by Russia, its former mother country, and by its German overseers, was very important. The Peace Treaty of Riga was important in that it not only settled the question of recognition, but also through this treaty Russia in renouncing forever its obligations toward Latvia at the same time released Latvia from making payments to it, which payments Latvia would have been obliged to make if it had continued to be a province of Russia. In this way, Russia in advance made void all possible claims against Latvia by the great Powers and thus released Latvia from being a participant in the payment of debts and pre-war loans contracted by Russia.

⁵ Compare H. W. V. Temperley, *A History of the Peace Conference of Paris*, Vol. VI (London, 1924), pp. 300-301.

Du Parquet, *L'aventure allemande en Lettonie* (Paris, 1926), pp. 126-156.

⁶ G. Albat, *Recueil des principaux Traités conclus par la Lettonie avec les Pays Étrangers* (1918-1928), Riga, 1928, p. 33.

⁷ League of Nations Treaty Series, Vol. II, p. 213.

Latvia's struggle for recognition *de jure* began before the Peace Conference and harmonized with the plans of the other Baltic States. This struggle lasted until January 1921. This period was characterized by a reluctant attitude of the Allies and especially of France, whose attention was almost entirely concentrated on the forthcoming conclusion of the peace treaty. Of course, Germany had no prospects whatsoever of annexing the shores of the Baltic Sea, with its harbors, so important for the tremendous Russian hinterland. On the other hand, Russia was also tied down by the conclusion of the Riga Peace Treaty, and thus the basic question arose whether the succession states—Latvia, Estonia and Lithuania—should forever take the place of Russia as an ally of the Western Powers. A positive decision was the more difficult as the resistance of the White armies inside Russia was not yet finally broken, and a big Russia, restored in its old Western borders, would represent a much better future ally for the great Powers and a much more solvent debtor than the new small States with their unstable economies. To this must be added the vigorous representations of the diplomatic representatives of the Anti-Bolshevist Russian Governments (Denikin, Kolchak, Wrangel). These governments were also recognized *de facto* and their claims were based on the temporary victories in South Russia and in Siberia. Furthermore, it is important to note that a representative of old Russia, M. Maklakov, participated in the Baltic Commission which was organized by the Allies for the purpose of investigating the situation in the Baltic States. In November 1919 the French General Niesel was appointed the head of a special commission to be sent to Latvia. On November 3, he invited the representatives of Estonia, Latvia and Lithuania to a general consultation in the French General Staff. He declared that the Allies had decided to carry out the full evacuation of the Baltic States by the remaining German military forces. In the meantime, Latvia itself, with its own forces, liquidated the Bermondts's military uprising, in which the German and Russian troops participated. The representatives of the Russian anti-Communist Government were inclined to cede the entire Baltic region to Germany as the price of overthrowing the Soviet power rather than to recognize juridically the Baltic States as such. France was one of the Allies chiefly interested in Eastern European relations, and it was eager to strengthen, first of all, Poland as a possible important ally in Eastern Europe. Therefore, France did not wish to engage itself too much to the Baltic States and decided to limit itself to their *de facto* recognition.

Furthermore, Woodrow Wilson's attitude at the Peace Conference towards recognition of the Baltic States was half-hearted. It is interesting to note that, in spite of numerous attempts on the part of the representatives of the newly created small States to see President Wilson, he never received their delegations. He may have been influenced by the criticism of his Fourteen Points on his return to the United States in March 1919. On the other hand, it must be remembered that Hurst and Miller did not even include the

rights of national self-determination or national minority rights in their project of the Covenant of the League of Nations; as a matter of fact, they left them out completely. The attitude of the United States toward the creation of new Baltic States is made clear in the note from the Secretary of State of the United States to the Ambassador of Italy at Washington, dated August 10, 1920, with regard to the application of Lithuania for admission to the League of Nations. The note reads as follows: ⁸

The United States maintains unimpaired its faith in the Russian people, in their high character and their future, that they will overcome the existing anarchy, suffering and destitution.

Until that time shall arrive, the United States feels that friendship and honor require that Russia's interests must be generously protected, and that, as far as possible, all decisions of vital importance to it, and especially those concerning its sovereignty over the territory of the former Russian Empire, be held in abeyance. By this feeling of friendship and honorable obligation to the great nation whose brave and heroic self-sacrifice contributed so much to the successful termination of the war, the Government of the United States was guided in its reply to the Lithuanian National Council, on October 15, 1919, and in its persistent refusal to recognize the Baltic States as separate nations independent of Russia.

. . . it (the Government of the United States) would regard with satisfaction a declaration by the Allied and Associated Powers, that the territorial integrity and true boundaries of Russia shall be respected. These boundaries should properly include the whole of the former Russian Empire, with the exception of Finland proper, ethnic Poland, and such territory as may by agreement form a part of the Armenian State.

The next step taken by the Latvian Delegation was a consideration of the problem of Latvia's entry into the League of Nations. Shortly before the discussion of the question concerning the admission of the Baltic States into the League of Nations, discussion which took place in the Assembly of the League (November 15-December 20, 1920). The representative of Latvia in Paris, Mr. O. Grosswald, addressed the French Foreign Office concerning the question whether France was for or against the admission of Latvia. To this query he received a clear answer, that France was against the admission of Latvia into the League of Nations. On November 25, the Latvian Delegation was invited before the Fifth Committee which was to decide upon the acceptance of new States into the League. The question of admitting all three Baltic States—Latvia, Estonia and Lithuania—was treated similarly. On December 16 the proposal was formally presented to the Assembly. The Committee submitted the following resolution:

The Commission recommends to the Assembly to communicate to the Governments of Estonia, Latvia and Lithuania as follows:

(a) That the proposal received due consideration, but the circum-

⁸ *Documents de l'Assemblée*, 20/48/100, Annex V.

stances being what they are, no final decision can be reached at the present time.

(b) That, in expectation of future decisions of the Assembly, the mentioned States may receive, on the basis of their application, the right to participate in the technical commissions of a general interest.

During the discussion of the proposal which preceded the final voting, one of the most important arguments concerned the fear lest Latvia, after having been admitted to the League of Nations, would, on the basis of Article 10 of the Covenant, ask for security against external aggression and for guarantees safeguarding her territorial integrity and political independence, as every other member of the League had the right to do. The second juridical argument concerned the lack of *de jure* recognition. These two arguments were referred to in the speech of the representative of France (M. Viviani), as well as in the speeches of representatives of Sweden (Branting) and Belgium (Paule).

Concerning the political aspect of the first question it was argued that the undertakings of the members of the League to respect and safeguard the territory and political independence of all members must be considered valid in the event of aggression or danger of aggression and called for defense with arms. From the juridical point of view, the undertakings should be considered valid for newly created as well as old States. But Latvia and the other Baltic States were surrounded by States whose intentions were not clear, and hence, in view of their geographic position, the existence of these newly created States remained, as it were, permanently endangered. Under these circumstances, the League could not lightly take upon itself obligations which it could hardly fulfill.

In the votes taken, Latvia, as well as Estonia, received 5 votes for admission and 24 against. Their admission was therefore declined. Those that voted in favor of admission of Latvia included one great Power (Italy), the four other votes belonging to Colombia, Persia, Paraguay and Portugal. The explanation lies in the fact that Italy was not so much concerned with the future solution of the Russian question as were the Powers of the Entente proper and especially France. Italy could very well sanction the creation of the new Baltic States calling for the expulsion of Russia from its former harbors, and it sided with England and France on this question.

The second argument—the lack of *de jure* recognition—was different. The struggle around this recognition, which was conducted very vigorously by all three Baltic States, can only be explained by political considerations. Even before this recognition, Latvia was existent not only factually but juridically. It was already in international relations with a number of States and was in no way hindered in this respect. Internally, too, the State was governed by a provisional constitution, the so-called political platform of November 18, 1918.⁹ The doctrine of international law as it

⁹ See my paper, "Die Verfassungsentwicklung Lettlands," in *Jahrbuch d. oeßf. Rechts der Gegenwart*, Vol. XI, 1922, p. 220 et seq.

applied to the emancipation of certain parts of former mother-countries, gives the following explanation: "Newly created States exist as soon as there are State organs which exercise a factually recognized dominance." Latvia fulfilled this requirement, especially after its *de facto* recognition in international relations. And if it still had aspirations to win the *de jure* recognition, this was because of political considerations: Latvia wished to be released from all consequences of cession; it wished to be completely free from former Russia. The Treaty of Riga with the Soviet Union did not give these guarantees, and Latvia, therefore, wished to have a confirmation of its international status and rights of property from the former allies of Russia.

In the meantime, the internal situation in Latvia had improved both economically and politically. On May 1, 1920, the Constituent Assembly had met. It was elected on the basis of universal, secret, direct and proportional voting. The number of deputies of the minorities (Russian, Jewish and German) was in proportion to those minorities in the population. In the social and economic fields, an important law on agrarian reform was adopted; also customs and taxes were legally fixed. The inner consolidation of Latvia made great strides.

Parallel with this many changes took place in the external situation. The various "fronts" of the so-called White anti-Communist governments in Russia gave up their desperate struggle. On the other hand, the Soviet Union in its tendency to expand westward was beaten by Poland. For a considerable time the Entente enjoyed peace on the Russian front. The political geography of Eastern Europe became more stable, and under these auspicious circumstances the question of *de jure* recognition of the Baltic States was brought before the Council of the Allied Powers at the end of 1920 and the beginning of 1921.

During the intervention period in Russia, France and England had the experience of witnessing the tendency of the forces of old Russia to establish contact with Germany, and they really did so in some instances. Beginning with 1918, a *rapprochement* between official Soviet Russia and Imperial Germany and later Republican Germany, was initiated. The interests of England and especially of France demanded the creation of a bloc of consolidated buffer States which would be equally alien to Germany and Russia. Latvia and Estonia appeared to have been, as it were, especially created for this purpose, since Latvia and Estonia lie close to the life lines of the traffic centers of their big neighbors.

These circumstances, as well as the active support of Italy, accelerated the further development of events. Furthermore, the industrial and financial circles of the principal Powers declared that their investments and active economic partnership in the new States would be possible only under full recognition of them. On January 24, 1921, the question of recognition was brought up on the order of the day of the Council of the League. The *de jure* recognition of Lithuania was declined or, to put it more correctly, post-

poned, because the Vilna dispute had not yet been settled. But as regards the other Baltic States—Latvia and Estonia—they did receive recognition. The document with regard to recognition of Latvia reads as follows:

INTER-ALLIED CONFERENCE

PARIS, January 26, 1921

TO THE PRESIDENT OF THE LATVIAN DELEGATION,
PARIS.

Dear Mr. President,

The Supreme Council of the Allied Powers, taking into consideration the requests presented at various times by your Government, has decided at today's session to recognize Latvia *de jure*.

Thereby the Powers wish to express their sympathy for the Latvian people and pay homage to the efforts which accomplished for them the establishment of order and peace.

Please accept, Mr. President, the assurance of my highest esteem.

(Signed) BRIAND

Poland and Finland recognized Latvia on the same day. Last of all, the United States recognized Latvia on July 28, 1922, with, however, a very important reservation concerning the reduction of Russian territory caused by the severance of Latvia, Estonia and Lithuania. This recognition has to be regarded as conditional.

In this connection, we quote the very significant communication of the American Consular Service, dated Kovno, July 28, 1922, addressed to the Lithuanian Government, but which may be regarded as pertaining also to Latvia and Estonia:

. . . The Governments of Estonia, Latvia and Lithuania have been recognized either "de jure" or "de facto" by the principal Governments of Europe and have entered into treaty relations with their neighbors.

In extending to them recognition on its part the Government of the United States takes cognizance of the actual existence of these Governments during a considerable period of time and of the successful maintenance within their borders of political and economic stability.

The United States has consistently maintained that the disturbed conditions of Russian affairs may not be made the occasion for the alienation of Russian territory, and this principle is not deemed to be infringed by the recognition at this time of the Governments of Estonia, Latvia and Lithuania, which have been set up and maintained by an indigenous population. . . .¹⁰

However, the United States later on amended this conditional recognition not only by the establishment of diplomatic relations but also by the conclusion of two important trade agreements, namely, the Provisional Commercial Agreement between Latvia and the U.S.A. (signed on February 1, 1926) and the detailed Treaty of Friendship, Commerce and Consular Rights between Latvia and the U.S.A. signed on April 20, 1928.

¹⁰ The same communication was sent on July 25, 1922, by the Secretary of State to the American Commissioner at Riga (see Papers Relating to the Foreign Relations of the U. S., 1922, Vol. II (Washington, 1928), pp. 873-874).

Latvia was admitted to the League of Nations on September 22, 1921, during the Second Assembly after its representatives, Messrs. S. Meierowitz and M. V. Salnais, made individually the following declaration, the first on September 9, 1921, and the second on September 14, 1921, in connection with carrying out of the rights of minorities:

The declaration of Sept. 14, 1921, reads as follows:

The Latvian Government declares that it is willing to adhere to the recommendations adopted by the Assembly of the League of Nations on December 15, 1920, and is prepared to enter into negotiations with the Council of the League of Nations in order to determine the extent and the methods of carrying out its international obligations for the protection of minorities.—M. V. SALNAIS.

These declarations have to be regarded as the fulfilment of the demands of the Assembly made on December 15, 1920, regarding the obligations of the Baltic States to protect the rights of the minorities. The resolution proposed by Lord Robert Cecil with regard to the protection of minorities was as follows:

In the event of Albania, the Baltic and Caucasian States being admitted into the League, the Assembly requests that they should take the necessary measures to enforce the principles of the Minorities Treaties, and that they should arrange with the Council the details required to carry this object into effect.¹¹

The recommendation was put to vote and carried.

* * *

It is clear that the recognition of Latvia which gave legal sanction to its emergence as a new State, was conditioned by the consent of its two mighty neighbors—Russia and Germany. Neither democratic Germany nor Soviet Russia was able to violate their international obligations under conditions of peace. However, with Hitler's rise to power, which brought about a thorough upheaval of all principles of traditional international law and a full restoration, if not intensification, of the *Drang nach Osten* looking toward the re-incorporation of the Baltic States, Germany's neighbor—the Soviet Union—felt itself at liberty to revise its initial restraint and generosity based upon the right of peoples to separate themselves completely from the State of which they form a part.¹²

The Soviet Union pressed upon Latvia (and the other two Baltic States) the signing on October 5, 1939, of a Pact of Mutual Assistance,¹³ the most important provision of which was the acquisition by the Soviet Union of con-

¹¹ From the 25th Plenary Meeting, Dec. 15, 1920 (League of Nations, Records of the 1st Assembly, Plenary Meetings, Geneva, 1920).

¹² See *The Baltic States Estonia, Latvia, Lithuania*, Oxford University Press (1938), p. 65 *et seq.*

¹³ Department of State Bulletin, Vol. I, pp. 542-543.

trol of naval bases, air-fields and coast artillery bases. Article V of this pact seeks to save the situation by reaffirming the recognition of Latvia's sovereignty. It reads as follows:

The carrying into effect of the present pact shall in no way affect the sovereign rights of the contracting parties, in particular their political structure, their economic and social system, and their military measures.

This pact was flagrantly violated within less than a year: on June 16, 1940, the Soviet Government submitted to Latvia an ultimatum demanding free passage of its troops and the formation of a government friendly to the Soviet Union. On June 17 this demand was complied with. On July 13 President Roosevelt ordered the freezing of Latvia's assets in the United States. On July 21, a newly elected *Saeima*—elected on the usual Soviet basis of a one-party system—adopted a resolution proclaiming Latvia a Soviet Republic and asking for incorporation into the Soviet Union. On July 23, 1940, the Acting Secretary of State, Sumner Welles, denounced the tactics used by the Soviet Union in “deliberately annihilating” the independence of the three Baltic States and declared that the United States will not recognize their absorption by Russia. This statement concludes as follows:

The policy of this Government is universally known. The people of the United States are opposed to predatory activities no matter whether they are carried on by the use of force or by the threat of force. They are likewise opposed to any form of intervention on the part of one state, however powerful, in the domestic concerns of any other sovereign state, however weak.

The United States will continue to stand by these principles, because of the conviction of the American people that unless the doctrine in which these principles are inherent once again governs the relations between nations, the rule of reason, of justice, and of law—in other words, the basis of modern civilization itself—cannot be preserved.¹⁴

The reluctance and even aloofness displayed by the United States during the first period of recognition of Latvia vanished the moment the United States entered into diplomatic relations with Latvia. Furthermore, the willful violation of Latvia's territorial integrity caused the American Government to show a greater concern for Latvia; and on September 5, 1940, the American Legation at Riga, including its consular section, was closed.¹⁵

¹⁴ Department of State Bulletin, Vol. III, p. 48.

¹⁵ *Ibid.*, p. 199. As a matter of fact we have on record a certificate issued by the Department of State, No. 1228, over the signature of Sumner Welles, Acting Secretary of State, on March 14, 1942, declaring that “the absorption of Latvia by either Germany or the Union of Soviet Socialist Republics is not recognized by the Government of the United States.” The Latvian Legation is mentioned in the March, 1943, issue of the Diplomatic List of the Department of State.

ITALIAN PRIZE COURTS (1866-1942)

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The Italian Code for the Merchant Marine enacted in 1865, four years after the proclamation of the Kingdom of Italy, and which in part is still in force, was intended to regulate all legal aspects of navigation in peace and wartime. It therefore contained provisions (Arts. 225-229) dealing with prize jurisdiction. Article 225 provided: "Judgment on the lawfulness of captures and on seizures shall be pronounced by a special commission which will be appointed by royal decree according to the rules to be enacted by special regulation."

The principle, thereafter always followed by Italy, was thus established that jurisdiction of prizes was not to be vested in a judicial body already in existence at the outbreak of hostilities, but should be granted to an administrative tribunal to be created for that special purpose whenever the occasion should arise.

One year after the enactment of the Code for the Merchant Marine the first Italian prize court, called *Reale Commissione delle Prede*, was created on the occasion of the war between Italy and Austria.¹ Article 211 of the Code, then in force, prohibited, upon condition of reciprocity, capture and condemnation of enemy merchant ships. Since the Austrian Government declared at the outbreak of the war that it would apply the same rule, the jurisdiction of the commission was limited to cases arising from transportation of contraband and violations of blockade.² It seems that no case was brought to the cognizance of the commission.

The second war of the Kingdom of Italy was fought in 1896 against Ethiopia. Although she had neither merchant marine nor access to the sea, Ethiopia received a substantial amount of contraband of war carried by neutral ships to neutral ports or desert localities on the Red Sea and the Indian Ocean wherefrom it was forwarded to the interior by caravan. A prize commission was established for the purpose of dealing with the legal incidents which might arise from the attempts of the Italian Navy to intercept this traffic.³ Its members were appointed by Royal decree No. 396, August 16, 1896. Procedural rules were issued by the commission on September 15, 1896.⁴ The only case decided was that of the Dutch ship *Doelwyk* which, while sailing in the Red Sea under suspicious circumstances,

¹ Royal decree No. 2979, June 20, 1866.

² Instructions of the Minister for the Navy, June 20, 1866, published by P. Fiore, *Nouveau Droit International* (1886), Vol. 3, p. 720.

³ Royal decree No. 396, Aug. 16, 1896, in *Gazzetta Ufficiale del Regno d'Italia*, Aug. 17, 1896.

⁴ *Gazz. Uff.*, Sept. 15, 1896.

was captured by an Italian cruiser. The ship was headed for the port of Jibuti. It had irregular papers, and carried arms and ammunition presumably intended for the enemy. By decision of December 8, 1896,⁵ the commission held that the ship was lawfully captured in application of the theory of ultimate destination, but ordered its restitution to the owners on the ground that the war had been terminated in the meantime by the peace of Addis Ababa, October 26, 1896.

Italy's third war was fought against Turkey in 1911-1912. War was declared by Italy on September 29, 1911. Turkey immediately captured some Italian ships and therefore Article 211 of the Code for the Merchant Marine, *supra*, could not be applied. By Royal decree No. 1145, October 13, 1911, regulations concerning captures and prizes were issued. Enemy vessels surprised by the war in Italian waters were granted several days of grace; those which entered Italian or Italian-held ports after the declaration of war in ignorance of hostilities were permitted to leave.⁶ A prize commission was created by Royal decree No. 1146, October 13, 1911, which also determined its jurisdiction. The commission issued its procedural rules on December 5, 1911.⁷ Enemy warships and state-owned vessels were confiscated without adjudication. The commission decided several cases⁸ dealing with the capture of enemy merchant ships,⁹ some of which had been fraudulently transferred to neutral flags; the seizure of enemy goods and contraband¹⁰ on Italian and neutral vessels; and the capture of ships attempting to run the blockade.¹¹ The Italian measures against neutral ships resulted in some international incidents which were settled by international arbitration¹² or through direct negotiations following inquiries by international commissions.¹³

⁵ Published in *Gazz. Uff.*, Dec. 15, 1896. See on this case E. Brusa, *L'affaire du Doelwyk* in 4 *Rev. Gén. de Droit Int. Pub.*, 1897, p. 157 ff.; and Fedozzi in 29 *Rev. Droit Int. et Lég. Comp.*, 1897, p. 55 ff.

⁶ Case of the *Clawki*. It reached Tripoli in ignorance of the state of war on Oct. 7, 1911, when the city had been occupied by the Italians. Its release was ordered by the Prize Commission, Dec. 7, 1915.

⁷ *Gazz. Uff.*, Dec. 9, 1911.

⁸ The decisions are published in *Atti della Reale Commissione delle Prede*, Rome, 1912.

⁹ The question whether a ship, the *Kaiseriet*, was an enemy transport or a hospital ship, and as such exempt from capture, was held to be one for the decision of the commission.

¹⁰ On Oct. 4, 1911, Italy issued a proclamation prohibiting transportation of contraband of war to Turkey either directly by sea or through transshipment or by land.

¹¹ Italy declared the blockade of the Turkish coast of Libya on Sept. 29, 1911 (modified Oct. 19, 1911); of the Turkish coast of the Red Sea on Jan. 21-22, 1912 (widened Apr. 5, 1912); and of the island of Rhodes on May 11, 1912. The question whether the Italian blockade of the Libyan coast was effective was decided in the affirmative by the commission, without sufficient consideration, in the *San Nicola* case, *Atti, cit.*, p. 383.

¹² Cases of the *Carthage* and the *Manouba*, decided by the Hague Permanent Court of Arbitration, May 6, 1913 (Scott, *The Hague Court Reports*, I, 1915, pp. 329 ff., 341 ff.). They involved the lawfulness of the diversion to Italian ports and detention of two French ships suspected of transporting contraband of war and enemy troops. In both cases Italy was condemned to pay an indemnity.

¹³ Cases of the French ships *Tavignano*, *Camouna* and *Gaulois*. The first of them was

On May 23, 1915, Italy declared war on Austria. At that time the largest part of the Austrian merchant marine was owned either directly or through corporations by people from Trieste, Fiume, Lussinpiccolo and the Istrian and Dalmatian coasts, who were notoriously of pro-Italian sympathy. When war appeared inevitable some of them did not hesitate to send their ships of Austrian registry to Italy.¹⁴ This accounts for the unusually liberal treatment accorded by Italy through legislative measures and decisions of the prize court to several owners of sequestered and captured Austrian ships.

A few days before her declaration of war on Austria, Italy decreed that in the case of her participation in the war Articles 211 and 243¹⁵ of the Code for the Merchant Marine would be suspended.¹⁶ At the outbreak of the war there were in Italian waters 21 Austrian and 36 German ships which had taken refuge there to escape capture by the Allies. By Lieutenant's decree No. 814, May 30, 1915,¹⁷ Austrian merchant ships in Italian ports which were apt to be converted into auxiliary cruisers were captured with a view to future condemnation. The other Austrian ships were sequestered, it being understood that title would remain in their owners, to whom they would be restored at the end of the war. Subsequently the sequestered ships were requisitioned and utilized for transportation, the freight charges to be credited to the owners.¹⁸ Shortly thereafter it was decreed that the freight charges from the ships sequestered were to be applied to indemnify Italian civilians for damages resulting from unlawful acts of war (aërial bombing of open cities, etc.).¹⁹ When it appeared that the freight charges were insufficient to cover these losses, all the ships were confiscated and condemned, and the proceeds applied to indemnify Italian civilians. It was provided, however,²⁰ that where the owners of the ships were Austro-Hungarian citizens of Italian nationality,²¹ the freight charges might be awarded to them.

stopped and the other two fired upon by Italian warships. The parties appointed a commission of inquiry and the dispute was settled by agreement May 2, 1913, whereby Italy consented to pay Frs. 5,000 for individual losses. (Scott, *op. cit.*, p. 413 ff.)

¹⁴ Cases of the ships *Salvore*, *San Marco*, *San Giorgio*, *Timavo* and *Grado*. Prize Comm. Dec. July 31, 1919, *Gazz. Uff.*, Jan. 16, 1920.

¹⁵ Art. 243 permitted enemy merchant ships which were in Italian waters at the outbreak of the war to leave with a safe conduct.

¹⁶ Royal decree No. 659, May 16, 1915, in *Gazz. Uff.*, May 22, 1915.

¹⁷ *Gazz. Uff.*, June 12, 1915. By Royal decree No. 699 of May 25, 1915, the King appointed a General Lieutenant to whom he delegated his ordinary powers, including that of issuing decrees. Decrees issued by the General Lieutenant are referred to as "Lieutenant's decrees".

¹⁸ Lieutenant's decree No. 957, June 17, 1915.

¹⁹ *Ibid.*, No. 1014, June 24, 1915, in *Gazz. Uff.*, July 9, 1915.

²⁰ *Ibid.*, Art. 4.

²¹ Nationality (*nazionalità*) as distinct from citizenship (*cittadinanza*) was determined chiefly with regard to the ancestry and political sympathy of the individuals in question. In cases of corporations, the nationality of the majority stockholders and of the members of the board of directors controlled.

Another decree of November, 1915,²² ordered the sequestration and capture of Germany's ships then in Italian ports, although Italy did not declare war on Germany until August 27, 1916. Italy adhered to the Anglo-French Convention of November 9, 1914, concerning maritime prizes.²³

A prize court was created by Lieutenant's decree No. 807, May 30, 1915.²⁴ Its jurisdiction was extended by Lieutenant's decree No. 1234, August 1, 1915,²⁵ to actions against the Italian State for damages resulting from unlawful exercise of the right of prize.²⁶ Procedural rules were issued by the court, June 26, 1915.²⁷ Since enemy merchant marines were practically inactive in the Mediterranean during the war, Italy had few opportunities of making captures at sea. Of the 189 cases decided by the commission,²⁸ the majority deal with the condemnation of Austrian and German ships sequestered and captured in Italian ports and of merchandise seized on board; many others with the determination of Italian nationality of the Austrian shipowners who claimed payment of the freight charges for their ships. A handful of decisions deal with the condemnation of enemy goods and contraband of war²⁹ seized on board neutral ships, and of neutral ships captured for alleged violations of blockade.³⁰ By Royal decree law No. 207, February 22, 1920, the commission was abolished and replaced by a commission for the compensation of damages resulting from illegal acts of war of the Italian Government. This commission decided only 14 cases of minor importance and was dissolved shortly after its creation. After the end of the war, many of the Austro-Hungarian ships were restored by royal decrees to their former owners who could prove their Italian nationality and acquisition of Italian citizenship by the peace treaties. If the ships had been sunk, the owners were awarded the insurance indemnity.

During the Italo-Ethiopian war of 1935-1936 no captures were effected and no prize courts created.

²² Lieutenant's decree No. 1605, Nov. 11, 1915.

²³ Exchange of notes Jan. 15-26, 1917, approved by Lieutenant's decree No. 482, Feb. 25, 1917.

²⁴ *Gazz. Uff.*, June 11, 1915.

²⁵ *Gazz. Uff.*, Aug. 18, 1915.

²⁶ Rules concerning the right of prize were enacted on different occasions during the war. They were reduced to final form by Lieutenant's decree No. 600, March 25, 1917.

²⁷ *Gazz. Uff.*, July 5, 1915. These rules were slightly modified on Sept. 13, 1915, *Gazz. Uff.*, Sept. 14, 1915.

²⁸ The decisions are published in *Ministero della Marina, Sentenze della Commissione delle Prede*, Rome, 1927. The principal legislative documents concerning the Prize Commission and its decisions were published by P. Fauchille and J. Basdevant, *Jurisprudence italienne en matière de prises maritimes*, Paris, 1918.

²⁹ Lieutenant's decree No. 839, June 3, 1915, contained the first contraband list, which was thereafter repeatedly enlarged.

³⁰ Italy declared the blockade of the coasts of Austria-Hungary and Albania on May 26, 1915 (limited, May 30, 1915; extended July 4, 1915); of Bulgaria on Oct. 20, 1915; and of Greece on Dec. 8, 1916.

Most of the Italian legislative measures concerning prize law and prize courts were hastily improvised after the outbreak of the wars occasioning them. Hence they often presented considerable defects which were all but cured by equally hasty amendments. To prevent the repetition of this situation in case of future wars, a commission of military and legal experts was appointed in 1935 to draft war and neutrality legislation. Its work resulted in the War and Neutrality Laws, approved in 1938.³¹ Their main purpose is to prescribe the fundamental rules of conduct to which the Italian authorities and armed forces must conform in cases of war and neutrality in order to comply with the duties and fully avail themselves of the rights established by international law for belligerents and neutrals respectively. The two laws may thus be considered an official restatement on the part of the Italian Government of what are, in its opinion, the international rights and duties of neutrals and of belligerents. War Law, Title 3 (Arts. 132-227), entitled "Special provisions for maritime warfare," deals in detail with military operations at sea; enemy goods; contraband of war; blockade; unneutral service; and visit and capture of neutral and enemy ships. Provisions concerning adjudication of prizes are contained in Articles 213-227.³² Rules of procedure before the Prize Tribunal (the name given to the prize court) were enacted in 1938³³ by separate decree.

On June 10, 1940, Italy declared war on France and Great Britain. Beginning at 12 p.m. of the same day, the War Law (including the provisions concerning prizes and their adjudication) was declared applicable to the territory of Italy,³⁴ her colonies and possessions.³⁵ New regulations concerning contraband of war were immediately announced.³⁶ Private enemy

³¹ Royal decree No. 1415, July 8, 1938, in *Gazz. Uff.*, Sept. 15, 1938. For a survey of the laws, see H. A. Steiner, "Italian War and Neutrality Legislation," in this JOURNAL, Vol. 33 (1939), p. 151 ff.

³² Title 4 (Arts. 227-279) deals with aerial warfare. Rules concerning aerial navigation (treatment of enemy and neutral aircraft and of goods on board; contraband of war; unneutral service; visit and capture; prize judgment) are along the line of corresponding rules concerning maritime navigation.

³³ Royal decree No. 1823, Sept. 5, 1938, in *Gazz. Uff.*, Dec. 9, 1938.

³⁴ War Law, Art. 2: "For the purposes of this law, State territory comprises all territory subjected under any title to the sovereignty of the Italian State, including territorial waters with the subjacent bed of the sea, and the superjacent aerial space."

³⁵ Royal decree No. 566, June 10, 1940, in *Gazz. Uff.*, June 15, 1940. The Italian War Law was declared applicable to Albania by an Albanian Royal decree of the same day.

³⁶ Art. 159 of the War Law limits contraband of war to seven items (arms and ammunition, tanks, warships, etc.); but Art. 160 provides that by royal decree and after notification to neutrals, the list may be enlarged as long as it does not include medical supplies and the materials necessary to the internal operation of the ship on which they are found. By note of June 10, 1940, and by *avis aux navigateurs* of the following day, the Italian Government reestablished the distinction between absolute and conditional contraband. Items indicated in Art. 159 were included in the list of absolute contraband, which comprises also such other items as combustibles, lubricants, money and securities. Food, forage, clothes and things necessary to their production constitute conditional contraband. Royal decree

ships were authorized, subject to reciprocity, to leave Italian waters within a short period of time.³⁷

The Prize Tribunal began to function in April, 1941. Its first ten decisions have been recently published.³⁸ Nine refer to enemy goods captured on board Italian ships or in Italian warehouses; one to the sequestration of a disabled British ship in an Italian shipyard. Although dealing with matters of minor importance, the decisions are interesting because in them the court has attempted, so far as permitted by the merits of the cases, to lay down some fundamental rules concerning the nature and function of prize jurisdiction, the characteristics of the procedure, and the proof of the claims, which it will probably follow in all its future adjudications. In the following analysis of the main rules governing the Italian Prize Court these decisions must therefore be considered a necessary complement of the statutory provisions.

Function of the proceedings. Italy follows the international rule that *toute prise doit être jugée*.³⁹ According to the Italian conception, seizure does not pass title, not even inchoate, to the prize.⁴⁰ Favorable adjudication of a prize court is necessary in order to vest title to the captured ships and goods in the seizing State. Before adjudication there is only a presumption that the seizure was lawful (War Law, Art. 217). It does not excuse the State from the duty of instituting prize proceedings. Things not submitted to prize judgment must be released. Only in case of the capture of warships or of goods and merchant ships owned by the enemy State, rather than by individuals, is prize judgment not required.⁴¹

Nature and organization of the Prize Tribunal. Following the precedent established in the preceding wars, Italy created only one prize court, *Tribunale delle Prede*, sitting in Rome. It was never doubted that the tribunal is an Italian organ, created by Italian legislative enactment, and not an international body. Proceedings before it are governed by Italian law exclusively (War Law, Art. 226). War Law, Article 218, provided that the Prize Tribunal was to function as a part of the State Council (*Consiglio di*

of July 16, 1940 (*Gazz. Uff.*, Aug. 9, 1940), which approved the lists, provides (Art. 1) that any other item comprised in the British and French lists will be considered contraband by Italy. Royal decree No. 1893, Dec. 16, 1940 (*Gazz. Uff.*, Jan. 29, 1941) provides that the decree of July 16, 1940, will apply with regard to France and Great Britain from June 11, 1940, and with regard to Greece from Oct. 28, 1940.

³⁷ Royal decree No. 655, June 16, 1940, in *Gazz. Uff.*, Aug. 9, 1940.

³⁸ *Ministero della Marina, Bollettino del Tribunale delle Prede*, Vol. 1, Rome, 1941. The publication has been reviewed in this JOURNAL, Vol. 36 (1942), p. 344.

³⁹ War Law, Art. 214; Dec. No. 1 (*Polinnia*, cargo), *Boll.*, *ibid.*, p. 19.

⁴⁰ *Ibid.*

⁴¹ War Law, Art. 214. In the first World War the Italian Prize Commission declared itself without jurisdiction in the case of the *Monfalcone* (*Sentenze, ibid.*, No. 160, p. 292), a floating pontoon belonging to the Austrian State and constructed for commercial purposes. The court added that the Italian Government had a right to appropriate the pontoon without necessity of a prize adjudication.

Stato), the highest administrative court of the realm, which even under the fascist régime continued to maintain its high tradition of impartiality and learning. Provisions enacted after the outbreak of the war ⁴² set up the Prize Tribunal as an independent body. The court is composed of several judges, who are chosen from the highest ranks of the judiciary, the navy, army and civil administration.⁴³ Thus some members are professional judges, others technical experts on the matters within the court's jurisdiction. Seven judges constitute a quorum.

Jurisdiction. *Ratione materiae* the tribunal has jurisdiction over controversies concerning the legality of seizures and sequestration of goods, ships and aircraft; on captures and recaptures. It also decides questions ancillary to those indicated above, such as payment of freight charges relating to seized ships and compensation for damages resulting from unlawful acts of maritime and aerial warfare. The tribunal takes cognizance of questions preliminary or incidental to the decision of matters within its jurisdiction.⁴⁴ The court declined jurisdiction to validate the sequestration of an enemy ship in the *Ulmus* case.⁴⁵ This English steamer was surprised by the outbreak of the war in an Italian shipyard where it was undergoing extensive repairs. It was not able therefore to leave within the period of grace granted to enemy private ships and was sequestered in compliance with Article 149 of the War Law, which provides that enemy ships, who either are not granted permission to leave or do not leave within the days of grace, may be subjected to sequestration.⁴⁶ Under Italian civil procedure, sequestration of property must be authorized by the court on *ex parte* order. After the property sequestered has been placed in possession of a custodian, the validity of the sequestration is determined by judgment of the court upon a litigated motion (*convalida del sequestro*). By application of the same principles to the sequestration of enemy private ships, the State sued the owner of the *Ulmus* before the Prize Tribunal to have the sequestration declared lawful. The Prize Tribunal decided that it had no jurisdiction of the subject matter of the action. The opinion distinguishes between capture and sequestration of enemy ships. The ultimate purpose of the capture is the condemnation of the ship, which deprives the owners of their property; sequestration, on the contrary, is a "domestic act of war administration of a defensive and protective character. It is intended to prevent the utilization of enemy ships and not to affect the property rights of their owners."⁴⁷ Sequestration of enemy ships being an act of an administrative nature, is not subjected to

⁴² Law No. 1902, Dec. 16, 1940, in *Gazz. Uff.*, Jan. 30, 1941; and Royal decree law of March 6, 1941, in *Gazz. Uff.*, Apr. 18, 1941.

⁴³ Judges were appointed by Royal decree No. 220, Apr. 1, 1941, in *Gazz. Uff.*, Apr. 18, 1941.

⁴⁴ War Law, Arts. 219 and 279.

⁴⁵ Dec. No. 7 (*Ulmus*), *Boll.*, *ibid.*, p. 63.

⁴⁶ See also Royal decree No. 1886, Nov. 25, 1940, in *Gazz. Uff.*, Jan. 28, 1941, sequestering private enemy ships which had not been permitted to leave or did not leave Italian waters within the period of grace.

⁴⁷ *Boll.*, *ibid.*, p. 67.

the rules laid down by civil procedure for sequestration in civil matters. Similarly, since no court is required to sequester an enemy private ship, so no court decision is required to validate the sequestration. This reasoning of the court, however, was contrary to the express provision of Article 219 of the War Law which confers upon the Prize Tribunal jurisdiction with respect to sequestration of ships. To offset this difficulty the court alleged that its jurisdiction concerning sequestration was limited to cases where the legality of such measure was disputed by some interested party. Since in the present case no adverse claim had been advanced by the owners, the matter was not within the court's jurisdiction.

With respect to the *situs* of the thing captured, the court established its jurisdiction over merchandise in transit seized in warehouses in Italian ports or on board Italian ships in Italian waters. In the former cases the court held that goods in transit still retain the quality of maritime cargo while stored in a warehouse in port and are subjected therefore to prize jurisdiction.⁴⁸ In the *Ulmus* case the tribunal implied that the *situs* of the ship, which had been captured in dry dock and not in the water, would not have been a bar to the court's jurisdiction in a proper action.⁴⁹ With regard to the jurisdiction of the court *ratione temporis*, counsel for the defendant in the first case alleged that the court had no jurisdiction of enemy goods in transit landed and stored in an Italian port before the outbreak of hostilities. It was urged that jurisdiction of the court extends only to articles which are within the scope of maritime operations,⁵⁰ and not to those which have been brought on land before the declaration of war. This plea was left unanswered by the court in its decision condemning the cargo. The court is judge of its own competence.⁵¹

Parties. The court has stated emphatically that litigation of matters in dispute is one of the essentials of Italian prize procedure. "The Italian prize system favors the appearance of the parties by all means practical in wartime, but actual appearance is not necessary for the legality of the proceedings."⁵² Parties to the proceedings are the King's Commissioner (*Commisario del Re*), the State and those interested in the things seized.⁵³ The

⁴⁸ Dec. No. 3 (*Beatrice C.*, cargo), *Boll.*, *ibid.*, p. 35; Dec. No. 4 (*Beatrice C.*, cargo), *Boll.*, *ibid.*, p. 42. For an Italian precedent during the first World War, see case of the *Ambra* (cargo *Oerlikon*), *Sentenze*, *ibid.*, No. 16, p. 84.

⁴⁹ During the first World War the Italian Prize Commission held that it had jurisdiction of actions for the condemnation of craft captured: (a) on dry land where they had been hauled possibly to avoid capture (the *Beleno*, *Sentenze*, *ibid.*, No. 61, p. 177); (b) in interior waters (the *Cervignano* and *Friuli*, *Sentenze*, *ibid.*, No. 50, p. 129); and (c) in non-navigable rivers where their presence was only occasional and transitory (*Leonilde* and *Otilia*, *Sentenze*, *ibid.*, No. 58, p. 170).

⁵⁰ The defendant's answer is published in *Boll.*, *ibid.*, p. 3 ff.

⁵¹ *Accord*, in the first World War, the Italian cases *Mikail*, *ibid.* (*Sentenze*, *ibid.*, No. 55, p. 145) and *Anthippi* (*Sentenze*, No. 56, p. 154).

⁵² Dec. No. 5 (*Beatrice C.*, cargo), *Boll.*, *ibid.*, p. 49; and Dec. No. 1 (*Polinnia*, cargo) *Boll.*, *ibid.*, p. 23.

⁵³ Rules of Procedure, Art. 20.

King's Commissioner is a functionary of the military judiciary. He coöperates with the court in the proper administration of justice and supplies the tribunal with information concerning the cases (Rules of Procedure, Art. 5). Memoranda and documents presented by neutral diplomatic and consular agents acting for the protection of their nationals must be addressed to him only. He may take them into consideration in expressing his opinion of the case (Rule of Procedure, Art. 4). The recommendation of the King's Commissioner must be heard before any order or decision be made by the court. In a technical sense the King's Commissioner is not an aid to the public administration which is a party plaintiff or defendant in the proceeding. He may recommend rejection of the latter's demands. The plaintiff in proceedings for the condemnation of goods and ships is the State, which usually appears by the Navy Department (*Ministero della Marina*). The chief distinction between the Anglo-American and the Italian system is that, according to the latter, the State is the claimant not only in a formal but also in a practical sense. "The capturing State has the quality of a plaintiff, with all the procedural consequences thereof, while those claiming rights in the captured things have the quality of defendants when appearing for the purpose of opposing the demands of the State."⁵⁴ The most important consequence thereof is that the burden of obtaining an affirmative judgment rests always with the State. In this task, however, it is assisted by several presumptions. If the State does not prove to the satisfaction of the court that the seizure was lawful, the things seized must be released even in the event of default of the defendants.

Defendants in condemnation proceedings are the owners of the things seized. Enemy owners have *persona standi in judicio* by virtue of the general principle enunciated in the War Law (Art. 280) that "Enemy persons continue to enjoy full capacity and free exercise of their rights with only the limitations established by law. They may be parties plaintiff and defendant." Neither shippers nor consignees and not even the purchasers who did not acquire title are entitled to appear in prize proceedings. The question whether mortgagees, pledgees and lienees may appear has been left undecided by the tribunal.⁵⁵ Only persons who claim an interest in the goods and not the States of which they are citizens, can be parties to the proceedings. From this principle the court has reached the conclusion that, for the purpose of prize proceedings, the embassy of the United States, which at the time was entrusted with the protection of British interests in Italy, could not validly represent or appoint an attorney for some British

⁵⁴ Dec. No. 1, *Boll.*, *ibid.*, p. 21.

⁵⁵ *Ibid.*, pp. 22-23. "By consistent adjudications of the prize courts the only one who is entitled to oppose the claim for condemnation of the prize is the owner of the captured thing. This right is usually denied to other classes of interested persons with few unsettled exceptions such as, sometimes, that of the creditor having a mortgage on the thing. On this delicate point, however, the tribunal does not have to pass judgment now."

firms which claimed a right in certain captured goods, since Great Britain herself could not have done so.⁵⁶

According to Anglo-American conceptions, the action by the Italian State for the condemnation of goods seized is one *in rem*. The judgment is effective against everybody.⁵⁷ The State acquires title in the things condemned free from mortgages, liens and any other right or interest of third parties. (War Law, Art. 224.)

Procedure. In condemnation proceedings the action is usually commenced by the State. If it does not bring suit within two months after the capture, any interested party may demand the release of the things seized, and if no action is taken by the State within the two following months the party aggrieved by the delay may commence the suit before the Prize Tribunal (War Law, Art. 215). Even in such case the actual plaintiff is the State with all the consequences arising therefrom. Parties may appear by attorney (Rules of Procedure, Art. 1). Attorneys for enemy defendants have been appointed in two cases by the court.⁵⁸ In all other cases defendants defaulted. A preliminary hearing before the presiding justice serves the purpose of determining the issues of fact and law in dispute. The presiding justice may attempt to settle the litigation. The pleadings for the most part are in writing (Rules of Procedure, Art. 22). The presiding justice may grant provisional relief concerning the *res* under the court's jurisdiction. It is compulsory upon the court to render judgment with an opinion. The only remedies available against judgments are revocation (*revocazione*), an exceptional remedy granted in cases where the judgment is the result of fraud, and recourse to the Court of Cassation on the ground of absolute defect of jurisdiction of the tribunal (War Law, Art. 221; Rules of Procedure, Art. 54). The judgment decides which party must pay costs, attorney's fees and other legal expenses. In none of the cases decided did the court make any order as to expenses, leaving each party to bear his own. In eight out of ten cases the State alone appeared. Release of the ship, aircraft or cargo, in whole or in part, may be ordered by royal decree before or during the condemnation proceedings (War Law, Art. 225).

Evidence. In view of the difficulty of proving facts in condemnation proceedings, rules of evidence, especially those regarding the burden of proof and the value of presumptions, are of particular importance. In the few cases decided, the court had the opportunity of laying down several principles and rules on the subject matter. The court remarked that its function consists in securing substantial compliance with the principle *toute prise doit*

⁵⁶ Decisions No. 2 and 3, *supra*.

⁵⁷ To this effect see the Italian case *Mikail*, decided during the first World War (*Sentenze, ibid.*, No. 50, p. 129).

⁵⁸ War Law, Art. 280, subd. 1: "Whenever an enemy person is sued before a judicial court, the latter appoints counsel for the defendant if it deems that he cannot adequately provide for his own defense."

être jugée. Hence the judge should not condemn the prize unless he is satisfied that the State's claim is fully proved. "It follows therefrom that the judge is not only bound to ascertain, even in case of defendant's default, whether the State has a cause of action; but he is also vested with special powers permitting him to proceed of his own initiative to collect evidence."⁵⁹ This principle is contrary to that controlling Italian civil procedure, wherein the judge is bound to limit his cognizance to the facts alleged and to the evidence offered by the parties (*judicium secundum alligata et probata*).

The court's statement that the plaintiff State is not relieved from the burden of proving its case in the event of defendant's default disposed of the contention of counsel for the State that the War Law (Art. 217), whereby "Capture and sequestration are presumed lawful until a judgment to the contrary intervenes"⁶⁰ raised a nonrebuttable presumption, in case of defendant's default, that the seizure was lawful. The court held that the provision of Article 217 has nothing to do with the proceedings. It only reaffirms with reference to prize law the general principle of Italian public law that every measure of the public administration is presumed to have been lawfully issued and can therefore be enforced by the administration without need for a previous judicial determination. This alone being the purpose of the presumption, its function ends when a judicial action is brought for the express purpose of contesting the legality of the act. "Since the purpose of the prize procedure is to pass upon the legality of the capture, its function would be nullified if a presumption of legality of the capture were imposed on the tribunal."⁶¹ "The circumstance that nobody appeared to oppose the claim of the Minister for the Navy does not excuse the tribunal, according to its precedents, from ascertaining that the State's claim is well founded. Nor does the presumption established by Article 217 authorize the tribunal to grant the demands of the Minister for the Navy without first being satisfied that the goods were susceptible to capture and the capture lawful."⁶²

Stare decisis. Although in the Italian system of law a precedent is not binding, decisions of authoritative courts are often quoted in the pleadings. Judgments of Italian and English prize courts have frequently been invoked by the parties. The tribunal itself has several times referred, in its opinions, to the "uniform precedents" and "consistent adjudications" of prize courts.

Substantive law applicable. War Law, Article 222, provides:

⁵⁹ Dec. 1, *Boll.*, *ibid.*, p. 21.

⁶⁰ A literal precedent for this provision is to be found in Art. 10 of the Italian Prize Regulations enacted during the first World War by Lieutenant's decree No. 600, March 25, 1917.

⁶¹ Dec. No. 3, *Boll.*, *ibid.*, p. 53. Since in Italian prize procedure the State is always the actual plaintiff in condemnation proceedings, the English principle that enemy ownership of the goods is conclusively presumed if no owner comes forward within a specified period of time from capture does not find application.

⁶² Dec. No. 10 (*Vulcania*, cargo), *Boll.*, *ibid.*, p. 83. See also Dec. No. 5, *Boll.*, *ibid.*, p. 49.

The Prize Tribunal applies the national law. Whenever a case cannot be decided by reference to express provisions of national law, nor with regard to provisions governing similar cases or analogous matters, recourse shall be had to international usage generally recognized.

This provision is in harmony with the Italian doctrine that international and municipal law are two separate systems, each exclusive within its own jurisdiction. International law can never be a part of the law of the land. Within the State, and, therefore, before national courts, including the Prize Tribunal, Italian law only applies. In resorting to international usage for the purpose of filling gaps that could not be bridged by recourse to analogy, the court, according to the Italian conception, performs a legislative function. It does not apply international law directly, but creates national law which, however, is consistent with international usage. In its first decision the tribunal pointed out that it applies only Italian law, both substantive and adjective. This law, according to the court, is consistent with international law.⁶³ There is no doubt, however, that the court, following the Italian precedents of the first World War, would apply national law even if conflicting with the international rules on prizes.⁶⁴

Order of the issues. Whenever condemnation was demanded on the grounds that the goods were both enemy owned and contraband of war, the tribunal decided the former issue first, on the ground that enemy property would make the goods liable to capture even if they were not contraband of war.⁶⁵ Since, in all cases decided, goods were condemned as enemy owned, the court did not pass on any question concerning contraband of war.

Enemy character of the cargo. Enemy nationality of the owner determines the enemy character of the cargo.⁶⁶ For the purposes of condemnation "enemy character of the cargo is to be considered with reference to the time when the capture took place; by consistent adjudications of the prize courts events subsequent to capture whereby changes in the nationality of the goods may have occurred are immaterial."⁶⁷ Rescission after the capture of the contract by which the goods have been sold and shipped to an enemy firm does not deprive the merchandise of its enemy character. On the other hand, "the capture is not revoked if the enemy character of the cargo, although nonexistent at the time of the capture, is established at the time when the condemnation proceedings are commenced."⁶⁸ In determining the enemy or non-enemy character of the merchandise, the court chiefly relied on the

⁶³ *Boll.*, *ibid.*, p. 19.

⁶⁴ The *Kyzikos* (*Sentenze*, *ibid.*, No. 15, p. 70); and the *Mikhail* (*Sentenze*, *ibid.*, No. 55, p. 145).

⁶⁵ *Boll.*, *ibid.*, pp. 23, 34, and 59.

⁶⁶ The Italian Prize Court applied the same principle in the first World War (the *Ambra*, *Sentenze*, *ibid.*, No. 16, p. 84).

⁶⁷ Dec. No. 1, *Boll.*, *ibid.*, p. 24.

⁶⁸ For an Italian precedent during the first World War, see the *Moravia* (cargo), *Sentenze*, *ibid.*, No. 20, p. 92.

presumptions arising from the bills of lading and other papers on board.⁶⁹ In case of discrepancies between the terms of the bill of lading and of the manifest, the former prevails.⁷⁰

Concurrence of two or more of the following presumptions has been deemed sufficient by the court to establish the enemy ownership and thus the enemy character of the cargo in the absence of any presumption to the contrary:

(a) *Enemy character of the seller or shipper.* This presumption is not affected by the circumstance that the bill of lading is to order. "The tribunal has no reason to depart from the rule consistently observed that goods consigned by an enemy sender under an order bill of lading are presumed to be enemy owned."⁷¹ Nor is the presumption overcome by the fact that the bill contains a direction to the carrier to notify a neutral firm, domiciled in the neutral port of destination, of the arrival of the goods. For the power of disposition still remains with the enemy sender, and property does not on shipment pass to the buyer.⁷²

(b) *Bill of lading to the neutral seller or shipper or to his order.* When the nationality of the seller⁷³ or shipper⁷⁴ is not established, or when they are neutral, goods shipped under an order bill of lading or under a straight bill of lading made to seller or shipper, are presumed to be enemy owned. For such methods of shipping goods are devices often resorted to for the purpose of concealing the enemy nationality of the consignee or buyer.⁷⁵ This presumption, however, has been generally considered insufficient if not supported by others (*e.g.*, destination of the goods to an enemy port). It can be overcome by proof that the seller or shipper has actually an office or agent in the port of destination.

(c) *Bill of lading made to an enemy firm.* This is one of the strongest presumptions that the goods are enemy owned, because the addressee of a bill of lading has the power of disposition of the goods and is presumed to be the owner in the absence of proof to the contrary.

(d) *Enemy character of the consignee.* Enemy ownership is presumed in this case also, because the consignee has the power of disposing of the goods. With reference to this situation, the court invoked "the principle generally accepted by the prize courts of the various nations, that the cargo upon delivery to the carrier is considered as being no longer within the power of disposition of the sender, but as being subject to that of the consignee."⁷⁶ "Merchandise is considered as belonging to the enemy by the mere fact that it is addressed to him, irrespective of the existence of contractual clauses providing that the risk and some powers of disposition remain in the sender until actual delivery to the consignee."⁷⁷

⁶⁹ The *Moravia* (cargo), *Sentenze, ibid.*, No. 9, p. 53.

⁷⁰ Dec. No. 6 (*Tergesteia*, cargo), *Boll., ibid.*, p. 59.

⁷¹ Dec. No. 6, *ibid.*, p. 59.

⁷² *Ibid.*, p. 61.

⁷³ Dec. No. 1, *ibid.*, p. 24.

⁷⁴ Dec. No. 3, *ibid.*, p. 34, and Dec. No. 4, *ibid.*, p. 42.

⁷⁵ Dec. No. 9 (*Maria*, cargo), *Boll., ibid.*, p. 79.

⁷⁶ Dec. No. 6, *ibid.*, p. 55.

⁷⁷ *Ibid.*, p. 55.

(e) *Destination of the cargo to enemy territory.* Cargo destined for an enemy port is presumed enemy owned in the absence of proof to the contrary. Enemy ports are those in territory under enemy sovereignty, mandate (Palestine),⁷⁸ or occupation (Egypt).⁷⁹ Greece has been held to be "territory notoriously occupied by enemy troops" in July, 1940, three months before Italy's declaration of war (October 28, 1940).⁸⁰ France after the armistice has been considered enemy territory for the purpose of condemning cargoes shipped to it not in compliance with the armistice provisions.⁸¹ For the purposes of condemnation, a country must be considered enemy territory although it was not such at the time of the capture, if it became such before the condemnation proceedings.⁸²

(f) *Lack of appearance of the parties defendant.* When the enemy character of the seller or sender is not ascertained, their default in condemnation proceedings is considered a presumption that they are not interested in the cargo and that they are aware of its enemy character.⁸³ This, however, is a weak presumption.

The presumptions invoked by the tribunal to establish the enemy character of cargoes had already been utilized during the first World War. At that time, however, they were resorted to for the entirely different purpose of establishing that goods seized constituted contraband. It is open to inference whether the confusion has been intentionally created by the Italian court in order to make easier the proof of the enemy character of the goods. Enemy character of firms interested in the cargo has been established in the absence of any proof to the contrary by the concurrence of two or more of the following presumptions: name (*Soc. An. Frigorifico Anglo; New Zealand Loan and Mercantile Agency, Ltd.; Ralli Bros. & Co.*); place of business, or domicile of the principal office in enemy territory; default in the proceedings.

In the decisions already published the Italian Prize Tribunal has taken advantage of every opportunity for stating emphatically that it intended to do substantial justice and to enunciate liberal principles. Under the facts of the cases decided there was little doubt that cargoes should have been condemned even under the most liberal rules. It remains to be seen whether in more doubtful cases which will be submitted to its adjudication, the court will continue to adhere to the lofty principles it has enunciated.

⁷⁸ Dec. No. 2, *ibid.*, p. 28, and Dec. No. 3, *ibid.*, p. 34.

⁷⁹ Dec. No. 4, *ibid.*, p. 42, and Dec. No. 10, *ibid.*, p. 84.

⁸⁰ Dec. No. 6, *ibid.*, p. 61.

⁸¹ Dec. No. 8 (*Juta bales*), *Boll.*, *ibid.*, p. 73. The court held that the Italian-French armistice of June 24, 1940, Art. 16, submitted French maritime traffic to German-Italian control. Maritime traffic to France not under Axis control was therefore still subject to the exercise of belligerent rights, including visit of ships and capture of cargoes, on the part of Germany and Italy.

⁸² Dec. No. 6, *ibid.*, p. 62.

⁸³ Dec. No. 3, pp. 34-35; Dec. No. 4, p. 42; and Dec. No. 6, p. 59.

THE TREATY OF PARIS AND TURKEY'S STATUS IN INTERNATIONAL LAW

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Writers on international law agree that its development in its present form began in the 16th century among the Christian States of Europe, when the feudal organization of the continent gave place to its modern organization in the "sovereign, independent" States of the traditional terminology, and that originally it was considered as not applying, or as not fully applying, to States outside the pale of Christian civilization. At the end of the 18th and until well into the 19th centuries it was common for treatises on the subject to bear titles referring not to "International Law" but to "European International Law,"¹ although such a title had ceased to be appropriate after the attainment of independence by the United States. It is also usually said that Turkey, the first Mohammedan State to join the family of States between which international law is in force, was brought into the family and made for the first time a subject or "person" of international law by Article 7 of the Treaty of Paris of March 30, 1856, which terminated the Crimean War. This view has, however, been disputed by A. H. Smith who argues that "for many centuries Turkey had maintained diplomatic intercourse and concluded treaties with Great Britain and other European Powers and . . . the general body of international law was considered to apply," and that the alleged recognition appears to have made no practical difference; and who accordingly suggests the meaning of the article to be that Turkey was formally "admitted to the specifically European group of nations which was deemed to have been established by the Vienna settlement of 1815."² Smith gives no details regarding the evidence on which his view is based, and other writers habitually content themselves with quoting the text of the article. It may be interesting to consider what light contemporary evidence throws upon the matter.

The text of Article 7 of the Treaty of Paris is as follows:³

Sa Majesté la Reine du Royaume Uni de la Grande-Bretagne et d'Irlande, Sa Majesté l'Empereur d'Autriche, Sa Majesté l'Empereur

¹ For example Günther, *Europäisches Völkerrecht* (1787); Klüber, *Droit des gens moderne de l'Europe* (1819); F. L. deMartens, *Précis du droit des gens moderne de l'Europe* (1831); Heffter, *Das europäische Völkerrecht der Gegenwart* (1855); Pradier Fodéré, *Traité du droit international public européen et américain* (1885).

² Great Britain and the Law of Nations, Vol. I (1932), pp. 16, 17.

³ British and Foreign State Papers, Vol. 46, p. 8 at p. 12. The Treaty of Paris, and the protocols recording the negotiations which led to the conclusion of that treaty, were drawn up in the French language only, and, as the exact words used are of importance, they are quoted in the present article in the original French.

des Français, Sa Majesté le Roi de Prusse, Sa Majesté l'Empereur de toutes les Russies, et Sa Majesté le Roi de Sardaigne, déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens. Leurs Majestés s'engagent, chacune de son côté, à respecter l'indépendance et l'intégrité territoriale de l'Empire Ottoman: garantissent en commun la stricte observation de cet engagement: et considéreront, en conséquence, tout act de nature à y porter atteinte comme une question d'intérêt général.

Another reference to "droit public Européen" appears in Article 15 of the treaty which provides:

L'Acte du Congrès de Vienne ayant établi les principes destinés à régler la navigation des fleuves qui séparent ou traversent plusieurs États, les Puissances Contractantes stipulent entre elles qu'à l'avenir ces principes seront également appliqués au Danube et à ses embouchures. Elles déclarent que cette disposition fait désormais partie du droit public de l'Europe, et la prennent sous leur garantie.

The "specifically European group of nations" to which Smith refers are the States which took part in the Congress of Vienna. They comprised all the States of Europe except Turkey,⁴ which was excluded by the influence of Russia. Like the peace treaties of 1919, the Act or General Treaty of the Congress (June 9, 1815)⁵ was intended to be a definitive settlement, and it claimed to embody a principle on which a solid peace could be founded, namely, that of establishing "relations from which a system of real and permanent balance of power in Europe is to be derived."⁶ It incorporated the territorial settlements and other provisions negotiated in the Congress and, while it was almost entirely the work of the five Great Powers, Austria, Britain, France, Prussia and Russia, and was signed only by them and their chief allies, Spain, Portugal and Sweden, all the "Powers assembled in Congress, as well as the Princes and Free Towns, who have concurred in the arrangements specified and in the Acts confirmed in this General Treaty," were invited to accede.⁷ The interest of all Europe in the settlement was thus recognized by admitting all European States to be parties thereto, and the Act was justly considered as a kind of "public law" applicable to Europe. It is so described by Wheaton in 1845 when, referring to the exclusion of Turkey, he writes: "The Ottoman Empire was not represented in the Congress nor included in the system of public law established by it."⁸⁻⁹ The "concert of Europe" was closely connected with these conceptions of the "public law" character of the Vienna settlement and of the European

⁴ Strupp, *Wörterbuch des Völkerrechts*, s.v. Wiener Kongress.

⁵ Hertslet, *Map of Europe by Treaty*, Vol. I, No. 27.

⁶ See Secret Article 3 attached to the peace treaty signed with France on May 30, 1814, after the first abdication of Napoleon, *British and Foreign State Papers*, Vol. I, p. 151 at pp. 169-170. The English text of this treaty is authoritative.

⁷ Act of the Congress of Vienna, Art. 119.

⁸⁻⁹ Wheaton, *History of the Law of Nations* (1845), p. 556.

balance of power. It was a principle or understanding in virtue of which the Great Powers were supposed to be the guardians of the peace of the Continent and responsible for controlling and sanctioning any necessary modifications in its territorial structure and balance of power as by treaty established. In the 1850's this whole body of ideas was still operative; indeed the Crimean War itself is an example of their operation;¹⁰ and it is perfectly possible that in Article 7 of the Treaty of Paris the terms "droit public européen" and "concert européen" express simply two aspects of the same thing, the reversal of the attitude adopted at Vienna and the recognition of Turkey as a full member of the European group of States. The correctness of such an attitude may be tested in the first instance by examining the records which show the genesis and object of the article.

The cause of the Crimean War was the apprehension created by the behavior of Russia whose treaties with Turkey, concluded as the result of several successful wars, already afforded her so many excuses for intervening in the affairs of that country as to give her what has been called "the position of something like the sole guardian of the Turkish Empire."¹¹ The possibility of further aggrandizement of Russia at the expense of Turkey was an evident danger to the balance of power. When, therefore, Russia in 1853, having assembled her forces, presented demands to Turkey pointing to such an intention and subsequently occupied Moldavia and Wallachia, she found Austria, Great Britain, France and, somewhat reluctantly, Prussia combining to encourage Turkish resistance and impose a settlement. After war had broken out the four Western Powers continued to regard the crisis as a question of the balance of power¹² and turned their thoughts to measures to reduce Russian domination over Turkey. Prussia, indeed, did not get beyond approving the objects to be attained and concluding an offensive

¹⁰ Cambridge Modern History, Vol. II (1923); Charles Dupuis, *Le Principe d'équilibre et le Concert Européen* (1909), Chap. 5, especially the observations from p. 72 onwards on the Crimean War.

¹¹ T. E. Holland, *Studies in International Law*, Ch. XI, The Treaty Relations of Russia and Turkey, 1774-1853, p. 217. The treaties were those of Kutschuk-Kainardji, July 10, 1774; Jassy, Jan. 9, 1792; Bucharest, May 28, 1812; Ackerman, Oct. 7, 1826; Adrianople, Sept. 14, 1829; Unkiar Skelessi, July 8, 1833.

¹² The maintenance of the balance of power is given the chief place among the motives for resorting to war recited in the preambles of the convention between Great Britain and Turkey relating to military aid to be given to Turkey, April 10, 1854, and the treaty between Great Britain, France and Turkey of May 8, 1854, dealing with the same subject. An attempt to give a general European character to the Anglo-French intervention is made by two articles of the first of these agreements, namely, Art. 4: "The H.C.P. being animated with a desire to maintain the balance of power in Europe, and having no interested ends in view, renounce beforehand the acquisition of any advantage for themselves from the events which may occur;" and Art. 5: "Their Majesties the Queen of the United Kingdom of Great Britain and Ireland and the Emperor of the French will readily admit into their alliance, in order to cooperate for the proposed object, such of the other Powers of Europe as may be desirous of being party to it." Sardinia acceded to the alliance on Jan. 26, 1855. See British and Foreign State Papers, Vol. 44, pp. 5, 8, and Vol. 45, p. 43.

and defensive alliance with Austria (April 20, 1854); but Austria, while disappointing the hope of Great Britain and France that she would join in the war, allied herself with them, and when it was still unlikely that the Allies could inflict a decisive defeat on Russia, actually brought the war to an end by threatening to break off relations with Russia if the terms on which the three Powers had agreed were not accepted.

The history of Article 7 of the Treaty of Paris, and evidence of the intention of the article, are to be found in the protocols of the conferences held during the war between the Western Powers and between them and Turkey and Russia, and in those of the Congress of Paris itself. These records show Article 7 to be closely connected with the conception of the concert and the balance of power. The germ of the article appears in a protocol drawn up at Vienna by the representatives of the four Powers on April 9, 1854, within a fortnight of the declaration of war by Great Britain and France (March 27 and 28).¹³ This document outlines a common policy for a peace settlement with Russia and declares "L'intégrité territoriale de l'Empire Ottoman est et demeure la condition *sine qua non* de toute transaction destinée à rétablir la paix entre les Puissances belligérantes, et les Soussignés s'engagent à rechercher en commun les garanties les plus propres à rattacher l'existence de cet Empire à l'équilibre général de l'Europe. . . ." ¹⁴ Here at least the meaning is clear. The system of European balance of power is to be made to cover Turkey. In the middle of 1854 Austria, Great Britain and France developed the April policies into four points or "guaranties" which they presented to Russia,¹⁵ and from March 15, 1854, to June 4, 1855, they joined with Turkey in full dress peace negotiations with Russia at Vienna on the basis of these guarantees as elaborated in a memorandum delivered to Prince Gortchakoff, the chief Russian plenipotentiary, on December 28, 1854. The attachment of Turkey to the European balance of power appears in the third guarantee and is there linked to the revision of the general treaty of July 13, 1841, which insured Russian naval preponderance in the Black Sea by closing the Dardanelles and Bosphorus to foreign warships so long as Turkey was at peace.¹⁶ The guarantee, as laid down in the memorandum, declares that this treaty must be revised with the object "de rattacher plus complètement l'existence de l'Empire Ottoman à l'équilibre Européen, et de mettre fin à la prépondérance de la Russie dans la Mer Noire." ¹⁷ In the discussions the two questions were again separated

¹³ Turkey had been at war with Russia since Oct. 23, 1853. Sardinia entered the war early in 1855.

¹⁴ British and Foreign State Papers, Vol. 44, p. 82 at p. 83.

¹⁵ For the text, see in British and Foreign State Papers, Vol. 44, pp. 88-90, notes exchanged between Great Britain and Austria on Aug. 8, 1854.

¹⁶ British and Foreign State Papers, Vol. 29, p. 703. The original parties to the treaty were the five great Powers and Turkey; it was open to accession by other Powers invited to do so by Turkey.

¹⁷ British and Foreign State Papers, Vol. 45, p. 53.

and at the 11th meeting on April 19, 1855, the French Foreign Minister, M. Drouyn de Lhuys, invited the Turks, as the party most interested in Turkey's connection with the balance of power, to put forward a definite proposal. Ali Pasha, the Turkish Foreign Minister, thereupon said he considered the question could be satisfactorily solved by the following provision:¹⁸

Les Parties Contractantes voulant manifester l'importance qu'elles attachent à ce que l'Empire Ottoman participe aux avantages du concert établi par le droit public entre les différents États Européens, déclarent considérer désormais cet Empire comme partie intégrante de ce concert et s'engagent à respecter son intégrité territoriale et son indépendance comme condition essentielle de l'équilibre général.

The principle of this text was approved and, as the result of French and Austrian suggestions, it was converted into a draft in two articles reading as follows:¹⁹

1. Les Hautes Parties Contractantes, désirant que la Sublime Porte participe aux avantages du concert établi par le droit public entre les différents États de l'Europe, s'engagent, chacune de son côté, à respecter l'indépendance et l'intégrité territoriale de l'Empire Ottoman, garantissent en commun la stricte observation de cet engagement, et considéreront tout acte ou tout événement qui serait de nature à y porter atteinte, comme une question d'intérêt Européen.

2. Si un conflit survenait entre la Porte et l'une des Puissances Contractantes, ces deux États, avant de recourir à l'emploi de la force, devraient mettre les autres Puissances en mesure de prévenir cette extrémité par les voies pacifiques.

At the next two meetings, April 21 and 26, we find Prince Gortchakoff insisting that these articles implied no obligation to take positive measures to protect Turkey (*garantie active*)—a view which Austria, France and Turkey united in regarding as making nonsense of the "*garantie commune*" which they contained²⁰—and assuring his incredulous colleagues that the most solid guarantee of Turkish independence was to be found in the decision "de faire participer la Sublime Porte aux avantages du concert Européen et de la placer sous l'égide du droit public de l'Europe."²¹ In the course of the argument Turkey produced a fresh version of the article²² which was not discussed. It altered the first lines of the article as follows:

Les H. P. C., pénétrées de l'importance qu'il y aurait pour le maintien de l'équilibre général de voir la Sublime Porte participer aux avantages du concert établi par le droit public entre les différents États Européens, déclarent la considérer désormais comme partie intégrante de ce concert; s'engagent, etc.

¹⁸ British and Foreign State Papers, Vol. 45, pp. 92-93.

¹⁹ *Ibid.*, p. 97.

²⁰ *Ibid.*, pp. 99, 117.

²¹ *Ibid.*, pp. 111, 114-115.

²² *Ibid.*, pp. 104, 110.

The next meeting of the conference on June 4 was the last, the negotiations having broken down on the question of the Black Sea. Throughout the record there is no trace that the participants were conscious that Turkey was not already a subject of international law, or that they were proposing to confer that status upon her.

The same thing is true of the Congress of Paris (February–April 1856).²³ It met to conclude an armistice and negotiate a peace treaty on the basis of a more stringent version of the four guaranties of 1855. The original participants were Austria, Great Britain, France, Sardinia, Turkey and Russia, but Prussia joined the Congress after the treaty had been drafted, and signed it in virtue of her status as a party to the 1841 treaty for which the new instrument substituted the system of neutralization of the Black Sea. The question of connecting Turkey with the European balance of power and concert was mentioned by the President of the Congress, Count Walewski, the French Foreign Minister, on February 28,²⁴ and was taken up on March 14. By that time agreement had been reached in substance upon the rest of the treaty. The texts produced at the meetings of 1855 were read and sent without discussion to the drafting committee to which the whole treaty was at the same time referred.²⁵ The text which this body²⁶ submitted to the Congress on March 18 was in three articles reading as follows:²⁷

Sa Majesté l'Empereur des Français, Sa Majesté l'Empereur de l'Autriche, Sa Majesté la Reine du Royaume-Uni de la Grande Bretagne et de l'Irlande, Sa Majesté le Roi de Prusse, Sa Majesté l'Empereur de Toutes les Russies et Sa Majesté le Roi de Sardaigne, déclarent la Sublime Porte admise à participer aux avantages du concert Européen. Leurs Majestés s'engagent, chacune de son côté, à respecter l'indépendance et l'intégrité territoriale de l'Empire Ottoman, garantissent en commun la stricte observation de cet engagement, et considéreront, en conséquence, tout acte ou tout événement qui serait de nature à y porter atteinte, comme une question d'intérêt général.

Les Conventions ou Traités conclus ou à conclure entre Elles et la Sublime Porte feront désormais partie du droit public européen.

S'il survenait entre la Sublime Porte et l'une des Puissances Contractantes un dissentiment de nature à menacer le maintien de leurs relations, les deux États, avant de recourir à l'emploi de la force, mettront les autres Puissances en mesure de prévenir cette extrémité par les voies de la conciliation.

The only material difference between this draft and those of the Vienna meetings is that the committee, abandoning the use of the phrase "établi par le droit public Européen" as a description of the "concert" of Europe, declares Turkey's treaty relations to be henceforth part of Europe's "droit

²³ British and Foreign State Papers, Vol. 46, pp. 63–138.

²⁴ *Ibid.*, p. 70.

²⁵ *Ibid.*, p. 89.

²⁶ It consisted of Ali Pacha for Turkey and the second plenipotentiaries of the other Powers.

²⁷ British and Foreign State Papers, Vol. 46, pp. 91–92.

public." Exactly the same expression is used in the article dealing with navigation on the Danube (Article 15) which is quoted at the beginning of the present study. It must have the same meaning in both contexts, and in Article 15 it cannot refer to international law as a whole. No competent draftsman would select a single clause in an agreement and declare it to constitute a legal obligation; if a system of law applies to an agreement, it applies to all its clauses. The stress must be on the words "*européen*" and "*d'Europe*," and the intention is to give to the engagements in question the character of engagements which, like those of the Act of Vienna, are part of the legal structure of Europe and matters in which all the States of the continent have an interest. One could, in any case, hardly imagine her allies saying to Turkey in so blunt and undiplomatic a form: "Your conventions and treaties which you have concluded with us and which hitherto have been legally non-existent and mere matters of moral obligation in the sight of the international law which *we* recognize, shall henceforth enjoy the protection of our international law."

On March 26 the draft treaty down to Article 14 was read in a meeting of the Congress itself. There is no record of any discussion, but in the text as finally adopted and entered in the protocol of the meeting²⁸ the second clause concerning Turkish treaties is omitted and the first clause is converted into the present text of Article 7 by substituting the words "*avantages du droit public et concert Européens*"—benefits of the European public law and concert—for the words "*avantages du concert Européen*," and by making a minor change of style. The third clause with changes of style becomes Article 8. "*Droit public*" thus returns to the place it had occupied in the April drafts with the single difference that it now appears there in its own right and not merely as the source of the "*concert*."

It is easy to conjecture reasons for the change. To make all Turkish treaty obligations, present and future, with the other contracting parties a matter of European concern was going rather far, and to say the "*concert*" of Europe was established by its "*droit public*" had not seemed satisfactory to the drafting committee. But whatever the reason, it is not credible that the change of phrase can have changed the whole scope and importance of the article and conferred on Turkey something which she had not demanded, and nobody had spoken of conferring upon her something, too, which it might seem a doubtful compliment to grant to a State with which the other contracting parties had for so long been connected by normal diplomatic intercourse and treaty relations of the most diverse and multifarious character. This conclusion is confirmed by the indiscriminate manner in which the protocols of the Congress use the expressions "*droit public européen*" and "*concert européen*" to describe the subject to which Article 7 relates. When first mentioned on February 28, 1856, at the second meeting of the Congress, it is called "*l'entrée de la Turquie dans le droit public européen*."²⁹

²⁸ British and Foreign State Papers, Vol. 46, pp. 105.

²⁹ *Ibid.*, p. 70.

On March 14, when it is again referred to, the words "concert européen" have replaced "droit public,"³⁰ but the latter phrase reappears in the description of the proposals sent to the drafting committee at the end of the meeting.³¹ Nevertheless, the title under which that committee presents its draft of Article 7 to the Congress on March 18 is "Entrée de la Turquie dans le concert européen,"³² and on March 25 Lord Clarendon, the British Foreign Minister and chief plenipotentiary, speaks of the Congress as "appellant la Turquie à faire partie du système politique de l'Europe,"³³ a description which perhaps describes the article better than any of the others.

It is difficult to reconcile this confusion of terminology with the view that the first sentence of Article 7 not merely brought Turkey into the concert of European States but for the first time put it upon the same footing as those States as a subject of general international law. Further evidence in the same sense is to be found in a memorandum which the British Ambassador at Paris and second plenipotentiary at the Congress, Lord Cowley, drew up on the evening of April 5, 1856, five days after Article 7 was adopted, and in which he contrasts the past situation of Turkey with that which she will have under the treaty and the annexed conventions.³⁴ He was able to record on the credit side the disappearance of the treaties on which Russia had founded her special position in regard to Turkey, the abolition of her *de facto* protectorate over Moldavia and Wallachia and Serbia and the substitution of a joint guarantee of the new régime of those principalities, the renunciation of any right of the Christian Powers to interfere in Turkey in defense of the Christian populations, the neutralization of the Black Sea and the banishment of all ships of war, except Russian and Turkish "police" forces, from its waters and of armaments from its coasts, the opening of the lower Danube to international commerce and the removal of the management of its mouths from Russian hands to those of an international commission, and the provision for mediation of the other contracting parties in disputes between any of their number and Turkey. His only mention of Article 7 is a simple reference to the "admission of Turkey into the international engagements of Europe."

There seems, moreover, to be evidence that the governments and political opinion in the contracting countries were quite unaware that the Treaty of Paris had effected a fundamental change in Turkey's status in international law. In England at the beginning of May, 1856, addresses of congratulation to the Crown upon the happy conclusion of peace were moved and carried in the House of Lords (May 2) and the House of Commons (May 5 and 6-7).

³⁰ British and Foreign State Papers, Vol. 46, p. 89.

³¹ *Ibid.*, p. 89.

³² *Ibid.*, p. 90.

³³ *Ibid.*, p. 100.

³⁴ For the text of this memorandum (F.O. 27.1125) see *The Cambridge History of British Foreign Policy*, Vol. II, Appendix D, p. 644. This history itself (p. 389) treats the article as admitting Turkey to the "European Concert."

The Government had to face strong criticism from the opposition on the weakness of the position in which the treaty left Turkey, but its official spokesmen made no attempt to invoke Article 7 in its defence, as might have been expected if the article had conferred an entirely new legal status upon that country. Among the 31 speakers who addressed one or other House, including Lord Clarendon and Lord Cowley, only three referred to the article, not one of whom asserted that an extension of the scope of international law had been effected by it.³⁵ Indeed there is evidence that before 1856 the British official world already considered international law to apply to relations with Turkey. Members of Parliament discussing the Eastern Question took that view and on at least one occasion it appears to have been accepted by the Government. A request for information on Turkish affairs was made in the House of Lords on April 25, 1853, by Lord Clanricarde, who referred to the previous occasion when, as he said, "France and England protested against the Treaty of Unkiar Skelessi, and declared they would not allow that treaty to form any part of the international law of Europe." In replying for the Government, Lord Clarendon said he thought "that the British Government are bound by the principles of sound policy, national interest and international law to uphold the Turkish Empire," but added that as regards the despatch by Austria to Turkey (in connection with action taken by the latter in Montenegro) of what he called a mission of somewhat peremptory character he "must say that there was nothing in the Austrian demands to infringe any principle of international law or that was inconsistent with the demand which one friendly government might make upon another." Lord Beaumont, returning to the question, declared

The people of Montenegro were the subjects of the Porte, and they occupied themselves in robbing and murdering their fellow subjects. The Sultan exercised his undoubted authority to suppress these infamous proceedings; and then Austria, a neighboring and friendly Power, interfered to prevent him. If international law admitted such proceedings, we should have been justified in interfering on behalf of the Hungarians and France would have had a right to interfere recently on behalf of the Milanese.

Lord Clarendon, replying to these remarks,

adhered to the opinion he had given that the Austrian Government had infringed no international law, for the terms in which the representations of the Austrian Minister were made fully bore him out. Austria did not impugn or deny any of the treaties that settled the sovereignty of Turkey over Montenegro, nor did Austria deny or dispute the authority of the Turkish Government to punish the outrages in question. . . .

³⁵ The mover of the address in the House of Lords devoted one sentence to calling attention to the "incalculable consequences of" what he called "the admission of Turkey into the pale of European States." In the House of Lords the mover of the address said that Turkey had been "received under the common law of Europe" and the seconder described the transaction as admission "into the European system." (Hansard, Parliamentary Debates, Session 1856, Vol. 141, col. 1947 *et seq.*, in particular cols. 1966, 2037, 2039, and 2045.)

Still more violent accusations of violation of international law by the Austrian Government were made in the Lords on the following August 12, but on that occasion nothing significant was said by the Government.³⁶

The same attitude seems to have prevailed in other countries. In France, a contemporary political year-book, the *Annuaire Historique Universelle ou Histoire Politique pour 1856*, which appeared in 1861, after giving the history of Article 7, concludes:

L'admission de la Turquie dans la famille européenne peut bien être le fruit de certains calculs mais elle témoigne aussi des progrès de la tolérance religieuse dans l'occident. Elle fait sortir l'Empire Ottoman de l'isolement où il se trouvait rélégué, et le fait entrer dans la sphere de l'action de l'Europe. . . .

In Russia the Czar, Alexander II, in his peace manifesto of March 19/31, 1856, referred to Article 7 in the following words: "The Sultan has solemnly recognized the rights of the Christians of the East and in consequence of this act of justice the Ottoman Empire is admitted to the concert of European States."³⁷ Russia could not in 1856 logically have taken part in admitting Turkey to participate in international law for, in the solemn declaration of war against Turkey of April 26, 1828, which, of course, was in essence a manifesto to the world at large, the Czar Alexander I had made it one of his grounds of complaint that

The Porte has nevertheless constantly misunderstood the advantages of its stipulations with St. Petersburg, and of the fundamental treaties of Kainardji, Jassy, and Bucharest, which by placing the existence of the Porte, and the integrity of its frontiers, under the protection of the law of nations, could not fail to contribute to the duration of its empire.³⁸

Moreover, Russia had concluded at least one treaty with Turkey stipulating for treatment in accordance with international law.³⁹ Austria was in the same position.⁴⁰ It may also be relevant to note that in 1852 Turkey had

³⁶ Hansard, Parliamentary Debates, Sess. 1853, Vol., 126, 1, cols. 1638 and 1641.

³⁷ Translated from the German version of the declaration in C. F. Wurm, *Diplomatische Geschichte der Orientalischen Frage* (1858), Sec. 23. The section as a whole bears the title "Die einföhrung der Türkei in das Europäische System. Der Garantie-Vertrag von 15 April, 1856," and it says nothing of a fundamental change in Turkey's relation to international law.

³⁸ From the English translation of the declaration in 138 Hertslet, Map of Europe by Treaty, Vol. II, No. 138, p. 777.

³⁹ The treaty of peace concluded at Kutschuk-Kainardji on July 10, 1774, Art. 16, No. 9, provides that the sovereigns of Moldavia and Wallachia shall be entitled to accredit to the Porte *chargés d'affaires* who shall be regarded "malgré leur peu d'importance comme des hommes jouissant du droit des gens et en consequence exempts de toute vexation." See Noradougian, *Recueil d'Actes internationaux de l'Empire Ottoman*, Vol. I, Text No. 36.

⁴⁰ The treaty of peace concluded at Sistowa on Aug. 4, 1791, Art. 13, provides that the Ministers accredited by either party to the other "joueront en vertu du *statu quo* strict de toutes les prerogatives du droit des gens et autres immunités attachées a leur caractère d'après les articles des Traités et l'observance établi." See Noradougian, *loc. cit.*, Vol. II, Text No. 3.

been invited to attend the first International Sanitary Conference and had signed the convention which was there concluded, although, like all the other signatories except France and Sardinia, she did not ratify it.⁴¹

The truth appears to be that towards the end of the first half of the 19th century the reasons for holding that Turkey was outside the operation, or not fully within the operation, of the international law observed by the Christian Powers had become for all practical purposes obsolete, owing to those Powers becoming the predominant partners in all relations between them and the Sublime Porte, and owing to the growing complexity and extent of their relations with it. The time was ripe for recognizing those relations to be governed by international law instead of the ambiguous combination of treaties and of compromise between Christian and Turkish practice to which lawyers had been forced to resort for their legal interpretation.⁴² But governments act. They do not, unless they must, draw theoretical conclusions from their acts or define their precise legal nature. This is left to the writer on international law. Two such writers did draw the conclusion that Turkey had become in all respects subject to international law. Wheaton in the 1846 edition of his *Elements of International Law*, in a section entitled Extension of the International Law of Christendom to the Asiatic and African Nations, observes that

the more recent intercourse between the Christian nations of Europe and the Mohammedan and pagan nations of Asia and Africa indicate a disposition on the part of the latter to renounce their particular international usages and adopt those of Christendom. The rights of legation have been recognized by, and reciprocally extended to, Turkey, Persia, Egypt and the States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and, as such, have

⁴¹ See Noradounghian, *loc. cit.*, Vol. II, p. lxiii, No. 643.

⁴² The most important element probably consisted of treaty provisions. Cf. Sir W. Scott (Lord Stowell) in *The Helena* (High Court of Admiralty, 1801, 4 Christopher Robinson 3, Hudson, Cases, 29-30): "as it is by the law of treaty only that these nations (*i.e.*, the African Mohammedan states) hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but what is derived from positive compact and convention." For the other element, see the same judge's judgment in *The Madonna of Burso* (4 Christopher Robinson 171-172): "The inhabitants of the Ottoman Empire are not the possessors of exactly the same Law of Nations with ourselves. In consideration of its situation and character, the Court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that Public Law, on which European states have so long acted in their intercourse with one another." Wheaton, *History of the Modern Law of Nations* (1845), p. 555, says: "In respect to the mutual intercourse between the Christian and Mohammedan Powers, the former have been sometimes content to take the law from the Mohammedan, and in others to modify the International Law of Christianity in its relation to them. Instances of the first may be found in the ransom of prisoners, the rights of ambassadors, and many others where the milder usages established among Christian nations have not yet been adopted by the Mohammedan Powers. On some others they are considered as entitled to a very relaxed application of the peculiar principles established by long usage among the states of Europe in constant intercourse with one another."

recently become the objects of conventional stipulations between the Christian States of Europe and that Empire, which may be considered as bringing it within the pale of the public law of the former. This observation will particularly apply to the treaty of the 13 July, 1841, by which the ancient rule of the Ottoman Empire, prohibiting the entry of any foreign ships of war into the Straits of the Dardanelles and the Bosphorus, is recognized and confirmed as a principle to be respected by all the contracting parties.⁴³

On the other side of the Atlantic, Sir Robert Phillimore, in his *Commentaries on International Law*, which was published in 1854, two years before the Congress of Paris, reached the same conclusion. Reviewing the extent and nature of the intercourse between Turkey and the Christian nations, and referring for confirmation of his views to the parliamentary debates of 1853, Phillimore writes:⁴⁴ "It is clear, even from this slight and cursory notice, that the Porte must now be considered as subject, with only such exceptions as the nature of the thing may dictate, not only to the principles of general International Law, but to the particular provisions of the European Code"; and he repeated the same view in his edition of 1877 without even mentioning the Treaty of Paris. On the other hand, Woolsey in 1868 still regarded international law as only "beginning to spread . . . into Turkey," and in an appendix summarizing the most important treaties since the Reformation he discusses the Treaty of Paris without commenting on Article 7.⁴⁵

In general, after the Treaty of Paris, writers on international law were misled by their familiarity with the phrase "*droit public européen*" as a name for their science and took Article 7 at its apparent face value. Thus in 1861 Sir Travers Twiss was of opinion that by subscribing to the article as a party to the treaty Turkey had "substantially pledged itself to the acceptance of the international law of Europe," although he notes that it has not "made any formal communication to the European Powers on the subject."⁴⁶ Heffter in 1855 thought that relations between the European Powers and Turkey were still in essentials subject to international law "as a matter of political convenience only, and not of right, and only to the extent to which reciprocity can be counted upon, in short purely on the basis of mutual consent,"⁴⁷ but in the editions of his treatise published after 1856 he adopted the attitude that the Treaty of Paris admitted her fully into the body of States between which international law applied, although he remarked that she was unlikely to observe its prescriptions very

⁴³ Wheaton, *Elements of International Law*, 3rd ed. (1846), Pt. I, Chap. 1, Sect. 13.

⁴⁴ Phillimore, *Commentaries on International Law* (1854), Vol. I, pp. 86, 87.

⁴⁵ Woolsey, *Introduction to the Study of International Law* (1868), pp. 20 and 420-421.

⁴⁶ Travers Twiss, *The Law of Nations considered as Independent Political Communities* (1861), Sec. 62.

⁴⁷ Heffter, *Das europäische Völkerrecht der Gegenwart* (3rd ed. 1855), Sec. 7. His actual words are "eine zwanglose, nach der zu erwartenden Reciprocität abgemessene, also eine bloss conventionelle politische Anwendung" of international law.

faithfully.⁴⁸ Heinrich Bernard Oppenheim in 1866 says simply that Article 7 brought Turkey into international law.⁴⁹ Hall (1880), who considered States outside the pale of international law could enter "into the circle of law-governed countries" by simply doing "something, with the acquiescence of the latter, or of some of them, which amounts to an acceptance of that law in its entirety beyond all possibility of misconception," regarded Article 7 as a more formal act than was necessary for the purpose.⁵⁰ Rivier (1896)⁵¹ and Westlake (1904)⁵² are more cautious. They treat the article as making Turkey a subject of international law, but regard this admission to the family of nations as incomplete owing to the maintenance of the capitulations and also, in Westlake's opinion, the many differences between Turkish and European civilization. For Oppenheim, the English apostle of the doctrine of the "constitutive" theory of recognition, the admission of Turkey in virtue of the article marks the moment at which "International law ceased to be a law between Christian States solely."⁵³ The same interpretation of Article 7 appears without the qualifications in John Bassett Moore (1906)⁵⁴ and later American writers.⁵⁵ It is unnecessary to follow it down the succession of modern treatises in the different countries.

If the evidence and arguments adduced above are valid, they support A. H. Smith's contention that such an interpretation should be rejected. Article 7 of the Treaty of Paris does not deal with Turkey's status in international law. It is not an instance of the recognition of an Oriental State as a subject of that law. Its purpose was not even, in a strict sense, a legal but rather a political purpose. The benefits to which it admitted Turkey were those of being formally declared to have her part in the legal structure of Europe, in the nexus of treaties and accepted policies which underlay and maintained the stability of the continent, and of being expressly included in the operation of the European concert. The article was an act of admission to what today might be called a regional understanding, and, if the Monroe Doctrine and the special treaties and principles developed and to be developed by the members of the International Conferences of American States constitute such an understanding, a treaty formally admitting Canada to profit thereby would be an analogous case.

⁴⁸ See, for example, the French edition of 1866, Sec. 7, where the article is said to have introduced Turkey "dans le concert et dans la communion du droit public européen."

⁴⁹ H. B. Oppenheim, *System des Völkerrechts*, p. 57.

⁵⁰ W. E. Hall, *A Treatise on International Law* (1880), Sec. 6.

⁵¹ Alphonse Rivier, *Principes du Droit du Gens* (1896), Tome I, p. 10.

⁵² John Westlake, *International Law*, Pt. I, p. 47.

⁵³ L. Oppenheim, *International Law*, Vol. I, Sec. 28.

⁵⁴ John Bassett Moore, *Digest of International Law*, Sec. 27, last sentence.

⁵⁵ *E.g.* Hershey, *Essentials of Public International Law and Organization* (1912); Hyde, *International Law* (1922); Fenwick, *International Law* (1924).

EDITORIAL COMMENT

FOURSCORE FOR THE EDITOR-IN-CHIEF

This number of the JOURNAL goes to press on March 29—the eightieth birthday of the Editor-in-Chief. Congratulations, Mr. Editor-in-Chief! and best wishes from your fellow members on the Board of Editors, for happy returns not only for the day but for the year and for the years to come:

Now, of the fourscore years I fend,
Twenty will not come again.
And take from eighty springs a score
It only leaves me sixty more.
(With apologies to *A Shropshire Lad*.)

Professor Wilson—as thousands of his former students affectionately know him and the many associates who have been privileged to enjoy his friendship insist on calling him, notwithstanding his title to more eminent academic honor—was one of the small band of men of faith in the future which met at the Lake Mohonk Conference on International Arbitration in 1905, and on June 2 of that year took steps to organize the American Society of International Law and to propose the publication of the AMERICAN JOURNAL OF INTERNATIONAL LAW. He was a member of the Committee on Organization and was elected one of the original members of the Executive Council, upon which he has remained continuously up to the present time, being successively reëlected for a number of three-year periods before becoming a permanent member by election as a Vice-President in 1922 and as an Honorary Vice-President in 1925. Of the thirty-six annual meetings of the Society, those have been rare, indeed, at which Professor Wilson has not been present, in some cases delivering formal papers, in others acting as presiding officer, and in all taking an active part in the informal discussions. His attendance at the meetings of the Executive Council have been as regular as at the meetings of the Society.

Professor Wilson was also one of the original members of the Board of Editors selected in 1906, and he has remained an Editor ever since. His contributions of articles, editorial comments, and book reviews, with which the JOURNAL abounds, cover substantially the whole field of international law and have been as various in their subject-matter and as dynamic in their treatment as the rapidly changing and developing world of international affairs in which he has taken an important and distinguished part for over half a century. In 1924, Professor Wilson was elected Editor-in-Chief, in which position we now hail him and look forward to many more years of his wise guidance in editing the JOURNAL.

GEORGE A. FINCH

POST-WAR DEVELOPMENT OF INTERNATIONAL COURTS

It is a truism to say that wars can be averted only if peaceful means can be substituted for the settlement of international disputes. However, the adoption of peaceful means rests upon the assumption of good faith in the relations between States. No system of international relations, however perfect, will satisfy a government whose responsible leaders consciously plan aggrandizement at the expense of neighbors, just as good government within a State may lessen the tendency toward crime, but is no guarantee against violators. In both instances the system must endeavor to protect itself against those who would destroy it.

There are some who believe that international law presupposes that States "apart from the general rules of customary law, are not bound at all except for their own agreement."¹ In the last analysis, customary law is only that which has been accepted; and the very principle that States, like individuals, are bound by their own agreement, is itself a concept of law. As Professor Mander has well said: "If sovereign States could not or would not bind themselves, or if there was mere 'auto-limitation,' international law was merely a precariously existent set of rules."² International law is a progressive system and cannot be condemned to rigidity. It subserves the needs of a community or family of nations in an inchoate state of organization. The contrary opinion which sees only a "constellation" of States, all following independent orbits, is inextricably connected with the old mystical concept of "sovereignty" which grew up in a state of international society so vastly different from that of the present time that, like the divine right of kings, it no longer fits the international scene. The nomenclature of sovereignty still abides, but where once it was employed to represent the ineluctable *rights* of States or their ruling princes, it is now, by customary law as well as by agreement, substantially controlled and modified by certain correlative *legal duties*. This field of the legal duties of States is bound to expand as a result of painful experience with the old system of the exaggerated and uncontrolled "rights" of States resting upon the concept of sovereignty. International law is not a static system. States are man-made. They are not absolved, like pagan gods, from all moral responsibility. The question which is now presented is the extent to which the action of States may be brought into the sphere of legal definition and control in the interest of peace and justice. In solving this problem, judicial processes will play an important rôle, and it is the task of judicial organization which now occupies the attention of jurists. The rest may be left to diplomacy and statesmanship.

The lawyers of the United States in their several organizations are deeply concerned about that part of the future settlement which relates to the reconstitution of the Permanent Court of International Justice and the possible

¹ Edwin Borchard, this JOURNAL, January, 1943, p. 48.

² Linden A. Mander, Foundations of Modern World Society (1941), p. 586.

organization of a more comprehensive judicial system. Lawyers practice a conservative profession and are not ordinarily accused of being either romantic or unrealistic. It is therefore not without significance that the American Bar Association, through the action of its House of Delegates and upon recommendation of the Association's Section on International and Comparative Law, recognized at its meeting at Detroit, in August, 1942, "that the United States must play a responsible part in the establishment and operation of international institutions designed to promote the principles of democracy and the common welfare of mankind," and resolved that the Association "reaffirms its confident belief in the necessity and practicability of international tribunals which will apply and develop international law." The resolution endorsed the view:

That means should be devised to establish and maintain in the post-war world an adequate international judicial system to the end that the rule of law may be established among as within nations, and it asserts the desirability of the coöperation of the United States in the establishment of such a system.³

The recognition of the importance of international legal tribunals does not require a belief in a court or courts as the *exclusive* medium for the pacific settlement of international disputes. This is sometimes maintained by laymen but seldom by those familiar with the variety of questions which vex the good relations of States. It should be recognized that there are clashing political interests which cannot be properly resolved by courts, and one may agree that "it is possible to do courts an injury by exposing them to the requirement of adjudicating political issues, even when clothed in the guise of legal questions."⁴ But this does not require us to concede that the State is therefore absolved from recourse to *any* means for the peaceful settlement of disputes deemed political. Such exemption was formerly relied upon by reason of a widespread use in arbitration treaties of clauses excepting submission of disputes involving the "national honor" or the "vital interests" of the contracting parties. While these provisions are now no longer in common use, other forms are employed which practically require a new agreement to arbitrate each particular dispute as it arises. Nor can we expect much progress until international authority is created with power at least to decide whether the claim giving rise to the dispute is sufficiently well-grounded to make imperative a settlement either by direct negotiation or, failing this, by arbitration or judicial settlement. Until that development has been reached, neither arbitration nor judicial settlement will be resorted to for the purpose of resolving disputes of more than minor importance.⁵

³ 28 American Bar Association Journal, 1942, p. 716.

⁴ Borchard, *ut cit.*, p. 52.

⁵ See Preliminary Recommendation on Postwar Problems, formulated by the Inter-American Juridical Committee. Reprinted in *International Conciliation*, February, 1943, pp. 104-105.

Another consideration making for the further development of the judicial process in international relations is its intimate relation to international organization. This is sometimes lost sight of by those irreconcilables who refuse to tolerate the idea of organized coöperation between the States of the world. Organization does not necessarily contemplate a superstate; neither does it inevitably contemplate a federal union, or a global community of States. Any of these may or may not be brought about in the post-war world; but it is not necessary to assume that they will come about in order to recognize that, no matter how modest the structure of international authority, the judicial process will play an essential rôle in the interpretation and coördination of the powers granted within the framework of the international authority. Such authority in its initial stages may be limited territorially to a certain group of States having the will to coöperate toward common ideals and objectives. It may come about to promote economic interests, especially within a certain geographic region. Whatever the limits of international authority, whether by subject-matter or by territory, the judicial process is likely to constitute the keystone of the structure.

Judicial tribunals operate organically as well as functionally. It was the failure to provide a supreme court which, as much as any factor, led to the failure of our Articles of Confederation.⁶ The members of the League of Nations recognized the coherence which the Permanent Court gave the League and were not willing to surrender the power of the court to render advisory opinions. This function was gravely misrepresented in the United States at the time, partly because of the internal political strife involved in the consideration of our adherence to the court, but also because of the misunderstanding of the divergence between judicial organization in civil law countries and those of the English common law. In the former group, the court system is an adjunct of civil administration. The French *Conseil d'État* furnishes an outstanding illustration of this function. It was natural that the advisory jurisdiction of the court should be sought to determine the scope and power of the organs of the League. The court responds to this function, not by giving private and *ex parte* advice, but by regular judicial procedure.⁷ The Supreme Court of the United States, although refusing to give advisory opinions, has acted as an interpreter of the power of the officials of the various organs of the Union almost from the beginning.

A further development of the judicial process in international relations is to be looked for in the establishment of regional courts. The Inter-American Juridical Committee recommended that the jurisdiction of the Permanent

⁶ See Charles Warren, "The Supreme Court and Disputes between States," *World Affairs*, December, 1940, reprinted in *International Conciliation*, January, 1941, No. 366, p. 25.

⁷ See John Bassett Moore, *International Law and Some Current Illusions* (1924), p. 131. See also Manley O. Hudson, *The Permanent Court of International Justice* (1934), p. 435, in which the author expressed the belief that the court's chief contribution to the maintenance of peace was the assistance given to the Council through advisory opinions. *Ibid.*, p. 466.

Court be extended and its procedure "coördinated with that of regional judicial tribunals, if any should be created; the jurisdiction of these regional tribunals being determined by the place and the subject-matter of the controversy." ⁸ The need for regional courts lies in the greater confidence with which States are willing to submit their controversies to courts made up of judges selected among territorial neighbors. It is quite understandable why disputes arising among nations of the Western Hemisphere have not ordinarily been submitted to the Permanent Court, although judges both from the United States and Latin America were represented on the court.

Submission to a regional court of disputes arising between States located within fixed territorial limits is likely to lead to more prompt disposal and with less expense than by reference to a single distant court. Such courts should dispose of disputes for which special commissions are now required, with the added advantage of having an established procedure and a gradually expanding jurisprudence. Even though all of the twenty-one American Republics, with the exception of the United States, adhered to the Permanent Court, proposals have been made by some of them for a court for the American continent. The Mexican proposal, considered at Montevideo in 1933, included a court with compulsory jurisdiction over so-called legal or justiciable disputes and voluntary jurisdiction over others. Regional courts assume particular significance because the enforcement of security may be subject to special regional agreements in which the countries most immediately affected would assume major responsibility in maintaining peace.⁹ Regional courts might well be given appellate jurisdiction over special commissions such as mixed arbitral tribunals similar to those set up at the close of World War I, which will doubtless have their counterpart after the present struggle. A limited right of appeal to the Permanent Court as reconstituted and strengthened might well be provided for.

Minority rights and individual rights cry out for recognition in the modern world. Theories of racial superiority and perpetual allegiance, coupled with the exercise in their behalf of a studied nihilism, threaten to destroy the values of civilization and endanger the existence of democracy everywhere. The well-intentioned system for the protection of minorities set up at the close of World War I failed largely because the complaint of particular minorities had no chance for a hearing on the merits unless a member of the Council of the League of Nations espoused the cause. At least any member of the League should have been accorded that right. Although many petitions were presented in the first five years after World War I, the well-known French jurist, Fouques Duparc, was impelled to remark that the privilege to petition accorded to minorities had only resulted in giving the Council an opportunity in most cases to express its confidence in the States accused of

⁸ See International Conciliation, February, 1943, p. 120.

⁹ See Linden A. Mander, *op. cit.*, p. 798.

a breach of the treaties.¹⁰ In other words, the considerations for allowing a *hearing* of the petition were political, even though the determination of the complaint under the various treaties was judicial.

These conditions call for correction. Access to the court or court system must be provided for recognized groups. Lord Phillimore who, with Mr. Elihu Root and Dr. James Brown Scott, took a leading part in the organization of the Permanent Court, favored giving direct access to the court under the Minorities Treaties to racial minorities organized as autonomous entities.¹¹ This would represent progress. The remedies of the nineteen-twenties, however, seem weak and ineffective when viewed in the light of the barbarities perpetrated upon racial, religious and political minorities during the thirties and forties. These events have caused the issues of the present war to be expressed by the United Nations in broad humanitarian terms. The rights of the common man against a State become tyrannical have, at long last, come to have consideration with a view toward international protection. If individual rights were adequately protected, there would be no need for minority rights. Indeed, the demand for individual rights may prove overwhelming after the present struggle, but it is not intended here to discuss the question further than to say that an indispensable minimum may be worked out. It is understood that the American Law Institute has undertaken the study of possible international guarantees for a Bill of Rights. Similar studies have been made abroad. Whatever the solution, only a tribunal following judicial procedure and free from political control is fitted, in the last analysis, to interpret and pronounce upon such rights embodied in treaties or legislation. As Sir John Fischer Williams has pointed out, the old rule that States alone can enforce international rights before a legal or arbitral tribunal, in the absence of some special provision, can hardly be destined to remain in force for an indefinite period of time. "States are human creations, and they are only one form of the organization of men."¹²

Finally, a fruitful field for the further development of the judicial process in the post-war world lies in the establishment of courts as indispensable aids in the international administration of colonies under mandate or other form of trusteeship. It is to be expected that responsible governments will profit by recent colonial and mandates history to adopt a more enlightened policy in the interests of native peoples in the world's backward areas. Such a policy would be necessary also to effect the fourth point of the Atlantic Charter, by which the signatories, within the limits of their existing obligations, expressed their willingness to endeavor to further the enjoyment by all States of "access, on equal terms, to the trade and to the raw materials

¹⁰ *Revue de droit international et de législation comparée*, 1923, p. 410.

¹¹ Proceedings of the Stockholm Conference of the International Law Association, 1924, pp. 530-533.

¹² Sir John Fischer Williams, *Aspects of Modern International Law* (1939), p. 21, quoted by Mander, *op. cit.*, p. 593.

of the world which are needed for their economic prosperity." A continuing source of international friction can be removed to the extent that such policies replace imperialism in the post-war world. However, a mere declaration, no matter how formal and solemn, will accomplish little without taking the specific steps necessary to make it effective. The system of mandates has been found unsatisfactory as tending toward gradual absorption by the mandating Power. Furthermore, the Mandates System was confined to supervision. It did not administer territory. It is now proposed to create instrumentalities for international colonial administration in certain specific territories, especially those in the "B" class.¹³

Measures of this kind are favored by some who have held high place in British colonial administration. It is important here to emphasize that, if international colonial administration is to be brought about in certain territories after the war, the existing Permanent Court, or a new court system, is essential to define and interpret the powers of the various international commissions and functionaries in order to make the system work successfully. It is to be expected that there will be competition and even friction between representatives of different States active in such administration concerning which a judicial body alone would be competent to adjudicate.

This survey of things to come is necessarily anticipatory and in no sense intended to be prophetic. However, it is based upon policies either favored officially within the United States, or unofficially by responsible groups engaged in post-war studies. The contributions which jurists may make toward what is popularly designated as "the making of a better world" will be determined by following a course between the Scylla of visionary schemes for placing upon the court the whole burden of settling international disputes and the Charybdis of a complete lack of faith and imagination for the development of new judicial structures to meet the requirements of the times. It is baneful error to assume that the political and economic rivalries between States are not subject to the rule of law. Viewed merely as interests and policies this may be true, but the acts taken to promote such interests or to effectuate such policies may be analyzed and judged. It is in this sense that we understand the remarks of Secretary Hull in his address of July 23, 1942, when he said that "settlement of disputes by peaceful means, and indeed all processes of international coöperation, presuppose respect for law and obligations."¹⁴ However, when controversies arise and negotiations fail of settlement, no State in the last analysis can be the sole judge as to whether it has by its conduct accorded due respect for law and obligations. International judicial organization is necessary to give international law the authority which, paradoxically, it now has principally in national courts.

ARTHUR K. KUHN

¹³ See Papers presented to the Commission to Study the Organization of Peace, Second Report. Reprinted in *International Conciliation*, April, 1942, No. 379, p. 215.

¹⁴ State Department Bulletin, July 25, 1942, Vol. VII, p. 645.

THE FORCED TRANSFER OF PROPERTY IN ENEMY OCCUPIED TERRITORIES

On January 4, 1943, the Department of State announced the text of a formal warning as to forced transfers of property in enemy occupied or controlled territories. The declaration was in the name of the United States, the nations of the British Commonwealth, Russia, China and certain captive countries. They—

reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever, (a) which are or have been situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or (b) which belong or have belonged to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder or of transactions apparently legal in form even when they purport to be voluntarily effected.

The generality of this warning is significant. It applies to "any transfers or dealings," including looting or plunder and apparently legal or illegal, voluntary or involuntary, transactions in respect of all kinds of property (public or private) at any time situated in those territories or belonging to residents thereof. The chief limitation is that the property shall at some time have been "situated" in the territories in question or "belonged" to persons "resident" in such territories, whether nationals or aliens. However, it goes no further than to reserve the right to declare such dealings invalid. Nothing is said about reparation for wrongs which cannot be thus corrected.

As to the countries involved, presumably the right to nullify such dealings would lie only in those governments having ultimate authority over the property and persons in question, *i.e.*, in the legitimate governments of the occupied or controlled territories. In this connection, it may be noted that several occupied countries, including Denmark, Estonia, Latvia, Lithuania, and the Philippines are not parties to the declaration, that the captive countries are represented by refugee governments whose authority may be doubtful in some respects, and that France and the French possessions are only represented by the French National Committee. The warning is not made in the name of the United Nations and does not apply to non-party countries.

Obviously the object is to nullify the predatory acts of the Tri-Axis Powers in certain of the territories which are or have been occupied or controlled by them in the Eastern Hemisphere. Presumably the dealings referred to are only those of enemy authorities, direct or indirect, including "undercover" transactions or dealings influenced by them.

The declaration assumes, of course, that the declaring countries will be victors in the present war and thus in a position to recapture the occupied territories and to establish governments which will accept and enforce the warning in question, and insist on provisions in the armistice or treaty of

peace that will cause the vanquished countries to a large extent to undo or compensate the dealings mentioned. The declaration reserves rights which are impliedly retroactive and which may, therefore, need to find lodgment in the terms of peace in order to be effective.¹

Apparently the object of the warning is to lay a basis which will require all transactions and dealings to be sifted out after the war so that those in which the military occupant has not had a hand and which have been carried through in good faith will not be disturbed. The warning apparently contemplates singling out the dealings which are illegal or which are directly or indirectly the result of undue military pressure and compulsion. Indeed an effort will undoubtedly be made to probe beneath any collusive camouflage invented by the diabolical ingenuity of the enemy to cover his tracks.

The declaration raises at once the question of the legality of the acts complained of. It is pertinent to inquire as to what extent the Axis Powers have a right to deal with the property, rights and interests situated in or owned by residents of the territories occupied or controlled by them in this war. In international law this is governed by the principles of belligerent occupation of enemy or hostile territory—a situation precisely envisaged by the declaration itself which relates only to territories occupied or controlled by enemies of the signatory Powers. It applies only between enemies and must, therefore, be read with the enemy status of the belligerents in mind. Thus, Bulgaria is at war with the United States and Britain but not with Russia and apparently not with Belgium, France, Netherlands, or Poland. Poland is not at war with Rumania or Hungary, nor is Russia at war with Japan, nor Finland with the United States, nor Denmark with any country. Furthermore, that part of Yugoslavia under General Mihailovic is still unoccupied by the enemy.

There can be no question that the Tri-Axis Powers have on a scale hitherto unknown plundered, looted, destroyed, seized and in other ways taken over or carried away public and private property in the occupied countries, including money, food, machinery, and manufactured articles, estates and farms, religious property, artistic, historical, cultural and scientific property, in many cases under circumstances unbelievably wanton and shocking to the conscience of mankind.²

¹ Some of the governments in exile have issued decrees declaring acts of the occupying authorities or acts done under their compulsion, direct or indirect, null and void: for example, Polish decree of 1939; Belgian and Yugoslavian decrees of 1941. The Polish decree expressly refers to Hague Convention No. IV of 1907 on the Laws and Customs of War on Land.

² *New York Times*, June 8, Sept. 15, Nov. 5, 7, 18, 1942. For the practice in the last war, see J. W. Garner, *International Law and the World War*; E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*. The German Land War Book of the last war declared that "the conqueror is in particular not justified in recouping himself for the cost of the war by inroads upon the property of private persons, even though the war was forced upon him." (Cited by Hyde, *Land Warfare*, 1918, p. 15.) These acts have been countered to some extent abroad by "freezing" orders and sequestration of enemy property.

The law of belligerent occupation is not in a wholly satisfactory state. The first international formulation of the law was the Hague Convention and Regulations on the Law and Customs of War on Land signed in 1899 and revised and supplemented in 1907. These rules are not entirely precise or adequate for all situations and give an unscrupulous occupant opportunity for evasion and abuse of discretion or allow interpretation according to the caprice of the commander. The practice of nations under and outside these rules is far from uniform, as the wars of this century have shown, and is now undoubtedly undergoing a change with the intervention of new implements and conditions of warfare. Wars are now carried on in the field with much larger armies, heavier equipment, greater mobility, greater use of aviation and radio communication, and at home the war industries engage a larger share of the population, the civil residents being less engaged in innocent business. No longer are wars fought by armies alone; in "total warfare" nearly the whole population is involved in supporting the armed forces. The status of privately owned property and the conduct of business have also suffered changes under the inroads of social doctrines and government regulation or control. Alien enemies are subjected to stricter surveillance and are frequently sent to detention camps and their property sequestered. Consequently the demands of the occupying army for supplies and services are greater and the need for protection and security of the troops is more exacting in a territory which is given over more wholly to war industries under government control or discipline and whose inhabitants are better supplied with arms and warlike implements and materials.

Nevertheless, it is significant that the Hague Regulations respecting the Laws and Customs of War on Land have pretty well survived all changes up to the present war and appear to constitute the formal law of belligerent occupation today. They expressly apply only to occupation of hostile territory, but it is usually held that they apply also to forceful occupation of neutral territory, such as Denmark at present. It is recalled that Convention No. IV of 1907 and the annexed Regulations "do not apply except between contracting Powers and then only if all the belligerents are parties to the convention," and that some of the belligerents in the present war, like those in the last war, are not parties or adherents to the convention. Nevertheless, belligerents have not generally taken advantage of this technical provision, but, on the contrary, have made the convention and regulations the formal basis of their practice and their contentions in particular cases. They have not denounced the Hague Regulations and contended for exemption on the ground of changed conditions of warfare. The peace treaties of the last war were based in part on the enforcement of these rules, and the governments of former occupants were held liable to make reparation for violations of them. Moreover, the tribunals established by those treaties in numerous cases made great efforts to uphold and apply the regulations.³

³ J. M. Spaight, *War Rights on Land*; C. C. Hyde, *op. cit.*; J. W. Garner, *op. cit.*; E. H. Feilchenfeld, *op. cit.* Karl Strupp cites a statement of the Reparation Commission that

Unfortunately, however, the Hague Regulations leave considerable discretion in the commanders of occupying forces as to interpretation and application. There are also gaps in the regulations which do not, as the preamble states, cover "all the circumstances which arise in practice." The cases not covered by the regulations, the signatory Powers declared, were "under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." The practice of reprisals or fines for alleged violations on the part of the enemy or hostile acts by the inhabitants has also been the source of deviations. Finally the license of "military necessity"—itself a vague and general term—gives rein to the ruthless commander. The Hague Rules, however, appear to be the standard to which belligerents refer in their protests to the enemy, in justification of their actions and even in support of their reprisals.

Without going into detail, it is clear that the Hague Regulations envisage the military occupant as a *de facto* power essentially provisional in character, not a sovereign, and circumscribed by certain unquestioned limitations. They require that "private property . . . must be respected" and "private property cannot be confiscated." "Pillage is formally forbidden." The seizure, destruction or damage of property "dedicated to religion, charity, education, arts and sciences" also "is forbidden." These restrictions prohibit the looting or destruction of private property. Yet a rigid adherence to the sanctity of such property would make war impossible. They must be read subject to the succeeding articles which allow the occupant to levy contributions upon giving a receipt, demand requisitions⁴ in kind and services upon compensation or receipt, seize war materials including means of communication and transport, and inflict penalties to obtain obedience, under certain limitations or conditions. Among other things, the levy of contributions for other than the needs of the army of occupation or the administration of the territory, the imposition of requisitions not needed by the army, the destruction of property not imperative for military operations or the safety of the occupying forces, and wanton confiscations, are condemned. On the other hand, the occupant has a wide latitude in the seizure of movable public property as booty (cash, funds, realizable securities, war-like stores and supplies, etc.) and the usufruct of immovable property owned by the State. Of course, military works may be destroyed. Violations of the regu-

damages inflicted upon nationals of the Allied Powers, as a result of requisitions effected by German authorities, are included in the total amount of the reparations debt when these reparations took place in occupied territory but not when effected in German territory. (This JOURNAL, Vol. 17 (1923), p. 671.)

⁴ There is no definite limitation on the amount of requisitions or contributions. Art. 52 merely provides that requisitions (not contributions) "shall be in proportion to the resources of the country." This is a very unsatisfactory rule and does not prevent virtual ruination of an occupied territory.

lations by the belligerent or by persons in its armed forces subject it to the payment of compensation.

Measured by the rules of the Hague Conventions undoubtedly the Tri-Axis Powers have in practice outstripped any past deviations from and violations of the laws of land warfare in their treatment of private and public property and in the commercial, economic and financial subversion of the occupied territories. Surely it must be the intention of the parties to the concerted warning to test the dealings and transactions in the occupied territories by the Hague Rules, and in cases not covered by them to apply the principles of the law of nations as was done after the last war.

In carrying out the objects of the warning effectively, especially in respect of transactions of an intricate character and involving the local laws, it would seem to be necessary to establish in the peace treaty, as was done in the Paris treaties, tribunals to which violations can be referred for adjudication. Such tribunals would be the proper means of protecting the rights of property and the business transactions as well as the interests of innocent third parties affected by the dealings in question. Meanwhile the concerted warning as well as the separate decrees of the refugee governments will put the persons concerned on guard and serve as a caveat to the enemy authorities that law shall prevail.

L. H. WOOLSEY

THE END OF EXTRATERRITORIALITY IN CHINA

On February 11 the President ratified with unanimous advice and consent of the Senate a treaty abolishing extraterritoriality in China. The proposal to negotiate this treaty had been made by the United States on October 9, 1942, the day before China's national anniversary. The treaty was signed on January 11, 1943, and submitted to the Senate by the President on February 1, 1943.

The treaty not only "abrogates" all provisions of "treaties or agreements" which authorize the United States "to exercise jurisdiction" over its nationals in China, but also terminates the Boxer Protocol of 1901 except for continued right to use the embassy premises in Peking for official purposes. It terminates United States rights in the international settlements of Shanghai and Amoy, and United States special rights of navigation and of naval police in the coastal and inland waters of China.

On the understanding of reciprocity, China accords citizens of the United States, national treatment in regard to residence, trade, civil rights, and overseas navigation, and most-favored-nation treatment in regard to inland and coastal navigation. Protection to property rights and recognition of judgments made by extraterritorial courts before the treaty went into effect are also stipulated. Treaty ports are abolished, all coastal ports are opened to navigation, and rights of residence are extended throughout the territory of China.

The treaty repeatedly emphasizes the intent to establish relations on a basis of "equality" and respect for "principles of international law and prac-

tice,"¹ thus acknowledging the propriety of the familiar Chinese protest against "unequal treaties" and against exceptions from the normal standards of international law.² It looks forward to the negotiation of a comprehensive treaty "based upon the principles of international law and practice as reflected in modern international procedures and in the modern treaties" of the United States and China, pending which matters not dealt with "shall be decided in accordance with generally accepted principles of international law and with modern international practice." This negotiation is to be begun within six months after the cessation of hostilities in the present war (Art. 7). The powers and functions of consuls are briefly stated and consuls of "each country shall be accorded the rights, privileges and immunities enjoyed by consular officers under modern international usage" (Art. 6).

Great Britain signed a similar treaty with China on the same day.³ Most of the former "Treaty Powers" had already signed treaties relinquishing extraterritorial rights or retaining them only so long as they continued to be enjoyed by any of the Treaty Powers. The few Powers which have not done so are in process of negotiating treaties similar to those just concluded by the United States and Great Britain. Sweden, for example, announced on February 22 such a negotiation.

After a century, the régime of extraterritoriality in China has come to an end. The British Treaty of Nanking was signed on August 29, 1842, the American Treaty of Wanghia on July 3, 1844, and the French Treaty of Whampoa on October 24, 1844. All gave unequal advantages to the Western Powers, but China at the time considered these Powers inferior. This is indicated by the Emperor's answer to the letter which Caleb Cushing presented from President Tyler to open the negotiation in 1844. It began:

The Great Emperor presents his regards to the President and trusts he is well.

I, the Emperor having looked up and received the manifest Will of Heaven, hold the reigns of Government over, and sooth and tranquilize, the Central Flowery Kingdom, regarding all within and beyond the border seas as one and the same Family.

R. P. Tenny attached the comment to this document that the character for "Emperor" is preceded by the character for "Great," that the character for "President" has no honorific, and that the first sentence is in colloquial Chinese as if addressed to an illiterate person.⁴

In treaties of 1902 and 1903 Great Britain, Japan, and the United States

¹ Preamble, Arts. 1, 6, 7, and supplementary exchange of notes. This JOURNAL, Supp., pp. 65, 66, 68, 69.

² Q. Wright, *Legal Problems in the Far Eastern Conflict*, Institute of Pacific Relations, New York, 1941, pp. 51, 109, 124.

³ *Bulletin of International News*, Royal Institute of International Affairs, Jan. 23, 1943, Vol. 20, p. 49.

⁴ Hunter Miller, editor, *Treaties and Other International Acts of the United States of America*, Government Printing Office, Washington, 1934, Vol. IV, pp. 661-62.

declared themselves ready to assist China in judicial reforms and "to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations" warrant them in so doing. As a sequel to the first World War, the Central Powers were obliged to relinquish extraterritoriality and the Soviet Union did so voluntarily. The problem was discussed at the Washington Conference of 1921-1922 and an international commission was set up to investigate. It reported in 1926 that conditions did not yet warrant the reform. In 1929 the National Government of China negotiated treaties for relinquishment of extraterritoriality with Belgium, Italy, Denmark, Portugal and Spain, and on December 30 of that year the Chinese Government declared that "the year 1930 is the decisive time, and the actual process of reestablishing Chinese sovereignty by the abolition of extraterritoriality begins on January 1." Negotiations with the United States and Great Britain were in progress when the Manchurian invasion took place in 1931. The United States and China discussed the question in 1937, 1940, and 1941.⁵ The present treaty marks, therefore, the termination of a process which has continued for forty years.

The termination of extraterritoriality in China is morally important. China declared a three-day celebration in honor of the event beginning February 5, 1943.⁶ Secretary Hull considered it "a concrete exemplification of the high principles for which the United Nations are fighting." The practical consequences will be no less significant, but they will not be evident until Japan's blockade of China and occupation of Chinese territory are ended and China again enters into commercial relations with the world.⁷

The termination of extraterritoriality in China has an even wider significance because it marks the end of extraterritoriality in the Orient as a whole. Apart from a few remnants of the system in Alexandria,⁸ the independent States of the Orient are now legally equal to those of the Occident. Japan,⁹ Siam,¹⁰ Iraq,¹¹ Turkey,¹² Iran,¹³ Egypt¹⁴ and China have successively

⁵ Department of State Bulletin, Oct. 10, 1942, Vol. 7, pp. 805-8.

⁶ *Ibid.*, Feb. 6, 1943, p. 134.

⁷ Q. Wright, "Some Legal Consequences if Extraterritoriality is Abolished in China," this JOURNAL, Vol. 24 (1930), p. 217 ff.

⁸ Mixed courts continue until 1949 under the Montreux convention of 1937. See Green H. Hackworth, *Digest of International Law*, Washington, 1941, Vol. 2, p. 516.

⁹ Treaty with United States, 1894, in force 1899, Arts. 18, 19.

¹⁰ Treaty with United States, 1920, in force 1921, Art. 16 and Annex 1; and 1937 in force 1938, Arts. 4, 18.

¹¹ Treaty with Great Britain, 1922, Art. 9, and judicial agreements, 1924, 1931; League of Nations Mandate, 1924; treaty with United States, in force 1931, Arts. 1, 2. See Hackworth, *op. cit.*, Vol. 2, p. 526.

¹² Treaty of Lausanne, 1923, in force 1924, Art. 28, and treaty with United States, 1931, in force 1933. The Turkish declaration in 1914 unilaterally abrogating extraterritorial rights was held to be without legal effect. Hackworth, *op. cit.*, Vol. 2, p. 529.

¹³ Notice terminating treaty of 1856 with United States and treaties with other countries, 1927, in force 1928.

¹⁴ Treaty with Great Britain, 1936, and with other countries in Montreux Convention of 1937.

been emancipated from the system. In colonies, protectorates, and mandated territories of the Orient, extraterritoriality does not exist, though the controlling Power assumes responsibility for justice to foreigners.¹⁵ The final stage in the acquisition of full status by States in all parts of the world and States of all religions and civilizations has been proceeding rapidly during the 20th century. China, Japan, Korea, Persia, Siam and Turkey attended the first Hague Conference in 1899. With the omission of Korea and the addition of Liberia the same non-western States attended the Hague Conference in 1907. In addition to these, Afghanistan, Egypt, Ethiopia, India, and Iraq became members of the League of Nations. Saudi Arabia, though not a member of the League, was a party to the Pact of Paris. Of these States, China, Ethiopia, India and Iraq are among the United Nations, as is the Commonwealth of the Philippines. With recognition of the full jural equality of these Asiatic and African States, the orbit of general international law has become worldwide. Although a number of States in the Orient are still in a dependent position, progress has been made toward fulfilling the pledge of the United Nations in the third point of the Atlantic Charter:

They respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-governments restored to those who have been forcibly deprived of them.

The community of Christian States of Europe, whose law was examined by Grotius and Vattel, was extended to Christian States of the new world during the late 18th and early 19th centuries. The process of extending it to both the Christian and non-Christian States of Asia and Africa began in the mid-19th century.¹⁶ The process will doubtless continue through the gradual emancipation of colonies, protectorates, and mandated territories, but the removal of extraterritoriality in China will remain an important landmark in progress toward a universal community of States. QUINCY WRIGHT

A FRESH TOKEN OF COÖPERATION WITH BRITAIN

Allies of different continents fighting a common enemy, and whose "merchant shipping is at the nerve center of the whole war effort,"¹ cannot afford to be hampered by useless litigation that hinders achievement. Accordingly, in most practical fashion, the United States and Great Britain on December 4, 1942, concluded an agreement designed to eliminate losses of tonnage and manpower in useless litigation. "In general, each Government has agreed

¹⁵ Mixed courts continue in Tangier, Morocco. The United States has not recognized the termination of extraterritoriality in the French or Spanish zones of Morocco or in Muscat, though other countries have. (Hackworth, *op. cit.*, Vol. 2, pp. 504-9, 530.) Claims to extraterritorial jurisdiction in Palestine and Syria were suspended by establishment of the mandates. (*Ibid.*, pp. 517, 524.) The United States and other countries have relinquished extraterritoriality in Korea, Zanzibar, Tripoli, and Tunis. (*Ibid.*, p. 534, and United States treaty with France, 1904.)

¹⁶ Q. Wright, *Legal Problems in the Far Eastern Conflict*, pp. 19-25, 124.

¹ Dept. of State Bulletin, Jan. 9, 1943, Vol. VIII, p. 28.

to waive claims against the other arising out of collisions, damage to cargo, and the rendering of salvage services."²

Hereafter, "if a collision occurs between a ship belonging to the one Government (whether warship or merchantman) and a ship belonging to the other Government, no legal proceedings will be taken to determine the degree of blame and no claims for damages will be made by either Government against the other. The work of repair will be undertaken at once without thought of anything but getting the damaged ship back into service in the war effort at the earliest possible moment. Nor where cargoes belonging to one Government are damaged while on board a ship belonging to the other Government will time be wasted in the future in determining the liability for such damage."³

According to Article 1, "Each contracting Government agrees to waive all claims arising out of or in connection with negligent navigation or general average in respect of any cargo or freight owned by such Government and in respect of any vessel (including naval vessel) owned by such Government against the other contracting Government or any cargo, freight or vessel (including naval vessel) owned by such other Government or against any servant or agent of such other Government or in any case where such other Government represents that such claim if made would ultimately be borne by such other Government."

The same article also contains agreement to waive salvage claims, as well as claims for loss of or damage to cargo arising out of the carriage thereof, or for loss of or damage to cargo or vessel caused by the shipment or carriage of cargo. Moreover, there is also an undertaking not to make claim in respect to any vessel or cargo insured by a contracting Government and to which it may be entitled by virtue of any right of subrogation in specified situations.⁴

Each contracting Government, upon the request of the other, is to provide undertakings for the release of vessels or cargo owned by such other, from judicial proceedings in the domestic courts, "where such release will promote the war effort," and where the requesting Government complies with certain specified conditions. Moreover, there is to be a reimbursement or account-

² *Id.*, where it is said: "In the end, of course, with two great fleets such as ours the litigation proves useless. Recoveries tend to even themselves out. No financial advantage is gained by either Government, but much essential manpower is lost in the process."

The arrangement was supplementary to the Mutual Aid Agreement with Great Britain of Feb. 23, 1942 (Dept. of State Bulletin, Feb. 28, 1942, Vol. VI, p. 190; this JOURNAL, Supp., Vol. 36 (1942), p. 170), and to the agreements for Reciprocal Lend-Lease Aid of Sept. 3, 1942 (*id.*, Sept. 5, 1942, Vol. VII, p. 734; this JOURNAL, Supp., *id.*, p. 219).

³ Dept. of State Bulletin, Jan. 9, 1943, Vol. VIII, p. 28.

⁴ According to Art. 3, for purposes of the agreement the expression "vessel owned by a contracting Government" is said to include "a vessel on bare boat charter to a contracting Government or requisitioned by a contracting Government on bare boat terms or otherwise in the possession of a contracting Government (except to the extent that the risk of loss or liability is borne by some person other than either contracting Government)."

ing for payment made or received by the one Government on behalf of the other.⁵ It is wisely provided that nothing in the agreement shall be construed as a waiver of the right of either contracting Government in appropriate cases to assert sovereign immunity.⁶

The Department of State adverts to the fact that the provisions of the agreement regarding waiver of claims relate only to claims of one Government against the other and do not apply to claims between either Government and private interests.⁷

In a season of war, such as during the present conflict, the acquisition by the contracting States of ownership, control or interest in the bulk of tonnage and cargoes moving between their territories serves to give to the principal claims growing out of collisions, damage to cargo and the rendering of salvage service, a public as distinct from a private character. This diminishes opportunity for the application as against private claimants of the broad rule of international law which, as interpreted by the Supreme Court of the United States, exempts from the local jurisdiction foreign public vessels, howsoever engaged.⁸

A practical feature of the agreement is the common and considerable saving of time, litigation, expense, etc., which would surely be involved if every claim arising from a collision, damage to cargo, or the rendering of salvage services, were productive of contentious litigation and adjudication. Practicing lawyers know this well; others may not realize it. Hence this word to call attention to the fact that all should apprehend.

The agreement has a psychological as well as practical value. It is a fresh and distinctive means of toughening the mental bond between English-speaking peoples which for sake of their common interest nothing should be permitted to weaken as they fight for freedom.

CHARLES CHENEY HYDE

A NEW TECHNIQUE IN INTERNATIONAL RECLAMATION

In the field of "human rights" there are strong concurrent movements in apparently opposite directions. One of these movements is toward the assurance of a higher standard for the treatment of the individual wherever he may be. The other is toward the relegation of the individual to national treatment whatever that may be. The first movement is inspired by the sentiments most eloquently expressed in the Atlantic Charter. The second is one of the manifestations of the policy of The Good Neighbor. It is possible that these two movements may be made to flow in the same direction by the adoption of a new technique in the handling of individual complaints of governmental violations of the minimum standard of civilization.

⁵ Art. 4.

⁶ Art. 5.

⁷ Dept. of State Bulletin, Jan. 9, 1943, Vol. VIII, p. 28.

⁸ See *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U. S. 562, 574, this JOURNAL, Vol. 20 (1926), p. 811; *The Navemar*, 303 U. S. 67, this JOURNAL, Vol. 32 (1938), p. 381.

The present technique in international reclamation is generally conceded to be exasperating to individual claimants and productive of friction between governments. The interests of individuals in the redress of their grievances through interposition of their own governments are necessarily subordinated to national interests, considered from a general point of view; and dossiers of claims gather dust, awaiting favorable moments for the establishment of arbitral commissions, which may in turn leave tasks half done, and all claimants without relief, upon the appearance of new crises in intergovernmental relations.

The doctrine, recently advanced from many quarters, that individuals have the right, under international law, to be treated, wherever they may be, in conformity with the often invoked minimum standard of civilization, and that this right, like that of minors and imbeciles to protection against fraud, is only accidentally dependent upon its means of enforcement—in the international sphere, the traditional method of diplomatic interposition—is open to some objections, practical as well as theoretical. We may, however, not unreasonably envisage the emergence, in the post-war world, of new agencies through which it may be possible to deal objectively with individual complaints, as symptoms of maladjustment inevitably encountered wherever people of one nation reside or sojourn among people of another nation, and to do speedy justice to the complainants without exacerbating relations between governments.

It may be doubted that the time is ripe, or is likely in the immediate future to be ripe, for the institution of a system of international tribunals to hear and determine claims by individuals acting for themselves or through counsel of their choice. The dogma of sovereign immunity from suit, under which American citizens complaining of wrongful action by their government are still dependent upon sovereign grace and favor, as expressed in acts of Congress for their relief, has a counterpart of even greater tenaciousness in international jurisprudence. States which have heretofore declined to participate in the establishment of tribunals with general jurisdiction of claims, on behalf of individuals, by one State against any other State, are not likely to expose themselves to pecuniary judgments at the suit of individuals, acting on their own behalf, in international tribunals of general jurisdiction. It may be possible, however, for States to agree upon a procedure of investigation and recommendation roughly corresponding to the procedure that has been followed for many years with respect to the multitude of claims, mostly without substantial merit, urged upon members of our Congress by aggrieved constituents. That procedure, as is well known, frequently eventuates in acts conferring jurisdiction upon the Court of Claims to hear and determine individual cases on their merits.

It may be assumed, for the purposes of the present discussion, that for at least a considerable period after the present war there will be either a continuing conference or an assembly with many of the characteristics of a con-

gress of the United Nations. It may also be assumed that the continuing conference or congress will rely upon committees for much of the detailed work upon which final decisions will be based. It may be assumed, finally, that the matters with which the continuing conference or congress will be properly concerned will include the minimization of international friction incident to the complaints of individuals concerning their treatment by governments other than their own.

Upon these assumptions, and with the understanding that the ultimate aim of any procedure that may be established is substantial justice to the individuals concerned, it would seem to be practicable for the expected continuing conference or congress to set up a committee, with a sufficient number of subcommittees and technical assistants, to receive, investigate, and report on all complaints filed by individuals against governments other than their own. The complaints received would in the great majority of cases be entirely without political significance, and the investigations required could in most cases be made with the coöperation of the authorities in the country in which the complaint originated. The reports of the committee, in cases found to have merit, might range all the way from (1) recommendations of reference to a court of claims (which might be established), through (2) recommendations of pecuniary relief (possibly as a matter of grace and favor) by the State complained of, to (3) recommendations of pecuniary relief by the continuing conference or congress, on the ground that an individual had suffered injustice for which no one government could be held responsible under existing rules of international law. The reports might also afford the basis for action of a comprehensive nature toward bringing about a greater measure of conformity by individual States to the accepted standards of "human rights."

The adoption of some such technique as that here suggested would be without prejudice to the doctrine that individuals are not the subjects of rights under international law. It would tend to provide individual redress and to raise the standard of national conduct with a minimum of international friction. It would require a considerable period of experimentation and improvement. It could operate, of course, only in connection with some kind of world order; but, if it were successful for any considerable period, it would be among the forces contributing to the continuance of world order.

EDGAR TURLINGTON

CURRENT NOTES

THE ANNUAL MEETING OF THE SOCIETY IN 1943

The Thirty-Seventh Annual Meeting of the American Society of International Law will be held at Washington April 30-May 1, in the Hotel Statler. The decision to hold the annual meeting at Washington was made by the Committee on Annual Meeting with due regard to all questions which had to be considered in view of the difficulties of transportation, hotel accommodations, and of the desire of the Government to reduce to a minimum travel not directly connected with the war effort. The Committee's decision was influenced by the fact that more than one-fourth of the entire membership of the Society is now resident in or near Washington either permanently or temporarily in governmental service and their attendance at the annual meeting would, therefore, involve neither transportation nor housing problems. As far as hotel accommodations for out-of-town members are concerned, the situation in Washington on week-ends is not nearly as difficult in this respect as on other days, and the Hotel Statler promises to take care of the Society's out-of-town members who may need accommodations in Washington for the meeting. It is suggested that members who wish to attend the meeting and will need accommodations in Washington should write immediately to the Hotel Statler stating that they are coming to the Society's annual meeting.

The meeting will be devoted to the general topic of the reaffirmation and methods of implementation of the fundamental principles of international law. It will be opened on Friday evening, April 30, at 8:15 o'clock, by Mr. Frederic R. Coudert, President of the Society. An important message will be read from the President of the United States, and another speaker of prominence will be announced later. The opening session will be followed by an informal reception.

On Saturday, May 1, at ten o'clock, Brigadier General Cornelius W. Wickersham, of the United States Army, Commandant of the School of Military Government at Charlottesville, Virginia, will deliver an address on the subject of "The Government of Occupied Territory," and the discussion from the floor will be led by Colonel Archibald King, of the Judge Advocate General's Division of the United States Army. Dr. Charles Cheney Hyde, Hamilton Fish Professor of International Law and Diplomacy at Columbia University, will follow with an address on the subject of "Punishment of War Criminals," which will also be discussed from the floor.

At two o'clock on Saturday afternoon, "The Treatment of Private Property of Aliens in Belligerent Territory" will be the subject of an address by Mr. John P. Bullington, of the Texas Bar, and the discussion will be led by

Mr. Mitchell Carroll, of the New York Bar, and Dr. Raphael Lemkin, of Duke University and formerly of the Polish Foreign Office.

The business meeting of the Society will be held at three o'clock that day and will be followed by a meeting of the Executive Council.

The annual dinner will be held at the Hotel Statler on Saturday evening preceded by an informal reception at 7:30 o'clock. Mr. Coudert, President of the Society, will preside at the dinner as toastmaster. The Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States, and the Honorable Hugh S. Gibson, former United States Ambassador to Belgium and Brazil, have already agreed to speak at the dinner. Another dinner speaker will be announced later. In view of the fact that it may not be convenient for many of the members to go to their homes before attending the dinner, dress will be optional.

The Secretary has sent a notice of the annual meeting by mail to every member of the Society in the United States and other countries to which the mails are open. He urges that all who wish to attend the annual meeting make arrangements without delay and that the subscription blank for the annual dinner be returned as soon as convenient so as to aid in making the best possible arrangements under the existing circumstances.

GEORGE A. FINCH,
Secretary

DECLARATION *

We, the undersigned, have formulated and approved, as individuals, the attached draft resolutions, and have agreed to submit them to certain legal societies and associations of which we are officers or members for their consideration and deliberation.

DRAFT RESOLUTIONS PROPOSED BY OFFICIALS AND MEMBERS OF CERTAIN LEGAL ASSOCIATIONS AND SOCIETIES

WHEREAS, breaches of the international peace and the suppression of international lawlessness are matters of continuing common concern to the Community of Nations; and

WHEREAS, the United Nations have determined to prosecute the war to a conclusive victory over the forces of aggression and inhumanity; and

WHEREAS, the building of institutions of peace is the most distinctive enterprise of our time; and

WHEREAS, the members of the legal profession, because of their specialized knowledge of the development of law and of government, have a particular duty to contribute to the formulation of workable plans for the preservation of world peace and the solution of problems common to all nations;

Now, therefore, be it resolved

* Released to the press March 29, 1943, from the New York office of Frederic R. Coudert, President of the American Society of International Law.

1. That a primary war and peace objective of the United Nations is the establishment and maintenance at the earliest possible moment of an effective international peace among all nations based on law and the orderly administration of justice; and

2. That the administration of international justice requires the organization of a judicial system of interrelated permanent international courts with obligatory jurisdiction.

3. That instrumentalities, agencies and procedures should be instituted and developed to declare and make effective the considered will of the Community of Nations.

ROBERT N. ANDERSON, *President, Federal Bar Association*

JOHN P. BULLINGTON, *Member of Council, Inter-American Bar Assn.*

FREDERIC R. COUDERT, *President, American Society of International Law*

WM. S. CULBERTSON, *Member of Council, Inter-American Bar Assn.*

NOEL THOMAS DOWLING, *Chairman, Committee on Comparative Constitutional Law, Inter-American Bar Association.*

JOHN FOSTER DULLES, *Member, Committees on International Law, New York State Bar Assn. and Association of the Bar of City of New York*

LAWRENCE D. EGBERT, *Executive Secretary, Inter-American Bar Assn.; Chairman, Committee on International Law, Federal Bar Association*

GEORGE A. FINCH, *Director, Division of International Law, Carnegie Endowment for International Peace*

DAVID E. GRANT, *Chairman, Coordination Committee of the International and Comparative Law Section of the American Bar Association.*

ARTHUR K. KUHN, *President, American Foreign Law Association, and Member, International Law Committees of the New York State and County Bar Associations*

JOHN K. LOUGHLIN, *President, American Branch of the International Law Association*

CHARLES T. McCORMICK, *President, Association of American Law Schools*

WILLIAM E. MASTERSON, *Chairman, Committee on International Legal War Problems, American Bar Association*

JAMES OLIVER MURDOCK, *Member of Executive Committee of Inter-American Bar Association*

AMOS J. PEASLEE, *Chairman, Committee of American Society of International Law on Cooperation with Other Societies.*

WILLIAM CATTRON RIGBY, *Chairman of the Executive Committee, Inter-American Bar Association*

JOHN T. VANCE, *Law Librarian of Congress; Member of Committee of American Society of International Law on Cooperation with Other Societies*

WILLIAM R. VALLANCE, *Secretary-General, Inter-American Bar Association*

GEORGE WUNDERLICH, *Member of Special Committee of the American Branch of the International Law Association*

THE LAW ABOVE NATIONS

Address delivered by Hon. Robert H. Jackson, Associate Justice of the Supreme Court of the United States, before the Inter-American Bar Association, Washington, D. C., November 20, 1942.

At this time dissension and lawlessness have the upper hand in much of the world. But we members of the legal profession throughout the Americas happily are united in a community of interest in the development and improvement of the legal systems of our several countries. Our common task is to enable each of our countries to realize the common aspiration of all our peoples for freedom under law. These professional interests bridge our differences of nationality, language, and legal philosophy. Some build on an inherited foundation of civil law; others, on the common law. But whether the law we evolve is Romanic-American or Anglo-American, our task is to adapt to the conditions of our American Hemisphere and to the problems of our day legal philosophies which had their origins far away and long ago.

Legal systems were early transplanted to the Americas, chiefly from Spanish, Portuguese, French, or English sources. Struggling new settlements met their need for law by borrowing from the older culture with which their people were most familiar. A highly developed legal system was brought to the American colonial empires of Spain and Portugal and has been an integral part of the life and culture in that vast territory for centuries. Legal concepts and philosophy have an importance in the minds of Romanic-American lawyers above the mere day-to-day practical adjustments of particular controversies. So, too, the French and English brought their law to the New World. But legal ideas, no matter whence they came, were modified by the impact of a hard and stubborn way of life in which the individual had new dignity and importance, and men lived and dealt on a plane of unprecedented equality. Men improvised governments as they needed them, with no mystery about their origins. American climate of opinion did not anywhere favor growth of a mystical concept of the State, as something above or before men and for which the individual must live and breed and die. In spite of the different cultural and legal traditions of the Americas their outlook on life was sufficiently alike that they created basically similar, and in many ways original, forms of constitutional government.

"The law," however, in the sense of a body of rules to govern the relations of persons to each other and to property and to be applied by the courts in adjusting controversies, is something surprisingly aloof from and independ-

ent of political government. Both our civil law system and our common law system have proven to be more persistent in the life of a people than any system of government. Both legal systems have survived many political upheavals. They have both served monarchial and republican régimes, and both have proved amazingly indifferent to forms of governmental authority as they have spread among people far from the lands where they originated.¹ Of course both systems of law do defer to territorial and national influences and to political controls, but law is woven into the habit of society as its warp and woof, while political governments are relatively superficial.

The persistence of both of these systems, as systems, is in contrast, however, with the readiness with which particular rules may be reformed. They have not the immutability of the law of the Medes and Persians. The usefulness and justice of living principles are constantly called up for reëxamination in the process of their application to the conflicts which new conditions stir among men. And while the rule determines the controversies, the conflicts also test the rule. Each generation is forced to rethink its particular rules of law, to rework them to fit new problems and to revise them in terms of its own life. This process of reviewing and reforming steadily but slowly works into the law of each country the new principles that experience convinces will make for the better life.²

¹ The capacity to survive is striking in the history of both systems of law. Apart from its survival of the fall of Rome and its steady evolution on the Continent under most varied conditions, the American experience of the civil law attests its durability. In lands once held by Spain and Portugal the pattern is unbroken. Although they refused further submission to those governments, they remained by choice subject to their civil law. Haiti, the first Latin-American colony to win independence, revolted against Napoleon but retained the Napoleonic Code. Cuba, the last to gain freedom, adopted political institutions quite out of the Spanish tradition, but kept the civil law derived from Spain. Likewise, the common law flourished in England through many political upsets. The United States threw off the political authority of England, but the states were unanimous in continuing the English common law tradition in their courts.

² An example is found in the history of the rules governing expatriation and naturalization. Europe, strongly influenced by the relation between kings and their subjects, held generally in both common law and civil law countries that an individual could not throw off the allegiance into which he was born and take on a new citizenship of his choice except with the consent of his sovereign. Older countries from which people were migrating insisted that wherever they went they still owed loyalty and even military service to the land of their birth. But in the New World a new doctrine arose responding to our need of population. The United States and other American countries championed the right of the individual voluntarily to expatriate himself and take on a new allegiance by naturalization. The difference in legal doctrine has been a persistent source of controversy, as the history of diplomatic exchanges between my country and governments of the Old World shows. Indeed, it had a large part in provoking the War of 1812. We could not accede to the proposition that members received into our new society might still be under obligations, including that of military service, to the countries they had left behind. In fact, no small part of our grievance against

The dissimilarity of method by which the civil and the common law systems submit their particular doctrines to change seems to me one of the most significant of their contrasts.

The civil law depends for progress on legislation, rather than on judicial pronouncements. Its method is to promulgate and from time to time to amend comprehensive codes of rules. To the judge is left only a small discretion; his duty is merely to apply the legislative rule to the specific case. In doing so he creates no precedent binding upon himself or others in the future. The emphasis in study and in application of the civil law is on principles, not cases.

It is quite the contrary in our common law countries. The great body of our private law has developed without ever being considered by any legislative body. The emphasis is on the customary law as declared in judicial decisions, particularly by courts of last resort. In declaring the law in a concrete case today the common-law judge does more—he unavoidably makes law for tomorrow. The precedent influences the common law in the direction of uniformity, stability, and predictability. While we have much legislative lawmaking and leave it to our legislature to take hurdles in law reform too great for heavy-footed judges, the judges also take a hand in revising and reforming rules of law.

Our people are becoming increasingly conscious, and our judges increasingly candid, about the lawmaking part of the judicial function.³ A case-law court of last resort may not be excused for an unconscionable judgment merely because a precedent may be cited for it. In such cases when old rules must be changed to fit new occasions, or new rules devised where there were none before, logic and tradition are not enough. "The life of the law," said Mr. Justice Holmes, "has not been logic: it has been experience."⁴ In the quest for experience common law judges are not required to forego lessons learned under systems other than our own. There is nothing irreconcilable between the wisdom of the common law and the wisdom of the

Germany today is that even yet she does not recognize the principle of expatriation which most other Powers of the world have finally, if reluctantly, accepted. She still demands that German emigrants yield her obedience and service, even against the countries in which they have made their new homes.

³ See Cardozo, "The Judge as a Legislator," Lecture III, *The Nature of the Judicial Process*. Yale University Press (1921).

Sir Frederick Pollock wrote: "The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances." 9 *Law Quarterly Review* 106 (1893).

Lord Mansfield is a classic example of the law-reforming common law judge. In effectiveness he was a one-man Parliament.

⁴ Holmes, "Early Forms of Liability," Lecture I, *The Common Law*. Little, Brown & Co. (1881).

civil law.⁵ And common law judges may, and do, take their law where they find it.

But in general the disciples of each system of law in the Americas have pursued their way with a good deal of aloofness toward each other. What we seek by association now is, of course, not the dominance or the capitulation of either system. We of the United States are awakening to a need for a full exchange of information, experiences, and professional opinion, such as will fertilize and enrich our jurisprudence and legal literature and thought from civil law sources.⁶ Consideration of the number and complexity of the problems that require legal solution here and which are also being dealt with in civil law countries will show how genuine is this need.

In constitutional, administrative, and public law all of our countries are in search of workable and just rules to achieve much the same ideal of liberty under law. The professional field of vision should include this whole hemispheric laboratory of republican government where experiments of great variety and importance are proceeding. The Western Hemisphere is preeminently a land of written constitutions. Our own is the oldest functioning Constitution. Our forefathers practiced economy of words to such an extent that it is written in a sort of legal shorthand, many of its phrases having meaning only by reference to contemporaneous legal doctrine. Our Bill of Rights is a series of majestic generalities. Amendment is difficult and heavily weighted in favor of inertia. Inertia is a factor so powerful as to be a real fourth department of our government. The constitutional history of the United States has been relatively a static one, nearly every great Power having extensively revised its institutions since ours were established. Judicial interpretation has been the chief method of adaptation to new problems. The responsibility which this casts upon the legal profession on the Bench and at the Bar is extraordinary, and every source of enlightening experience or responsible commentary should be laid under tribute for our task.

⁵ Common and civil law systems coexist in both Canada and the United States. Quebec and Louisiana adhere to the French tradition. Several others of the United States have been much influenced by Spanish law and retain doctrines from it, such as community property holding between husband and wife. Common law states have shown a marked tendency toward codification. This has been one of the most useful devices of those who work for uniformity of law among the states, such as the National Conference of Commissioners on Uniform State Laws. The American Law Institute, while chiefly engaged in restating case law, has also proposed a model uniform Code of Criminal Procedure.

The Union of South Africa is an interesting example of the compatibility of English common law with Dutch civil law.

⁶ This recent interest is both evidenced and stimulated by such contributions as the address by Dr. Ricardo J. Alfaro to the American Bar Association, "The Legal Profession as Seen Through the Eyes of a Latin-American," 28 American Bar Association Journal 742 (1942); also, "New World Constitutional Harmony," by George Jaffin, 42 Columbia Law Review 523 (1942); Studies of the Comparative Law Section of the American Bar Association; and, of course, most importantly by the deliberations of the Inter-American Bar Association.

While the other American Republics have looked to Europe for their systems of private law, they have without exception adopted written constitutions which embody the basic concepts found in the Constitution of the United States. But all of the other constitutions came much later in point of time. Half of the American Republics have framed new constitutions since 1932.⁷

Five of our neighboring peoples, like ourselves, have adopted federal forms of government. But Canada, Mexico, Venezuela, Brazil, and Argentina, have each enacted variations from our system determined by their appraisals of our weaknesses. Writing near the time of the Civil War, in support of the British North America Act, Sir John Macdonald pointed out that it had been framed to avoid "that great source of weakness which has been the cause of disruption in the United States." Each of the constitutional departures in this hemisphere from our practice is likewise a considered judgment upon defects or merits of our own system.⁸ We may not agree with those conclusions, but we cannot afford to ignore the informed opinion of those whose detachment from our internal affairs gives their judgments a perspective which our own often lack.

One of the problems with which these later constitution-framers have struggled is how wisely to allocate power as between local and central authority, a problem that is particularly delicate as between a federal government and its constituent units. The implications of our federalism as to the allocation of power between the States and the central government has constituted the most recurrent and bitter controversy in our constitutional history. It seems likely ever to remain a source of vexation and discord. James Bryce visioned our federal system in the United States as a phase of more extended constitutional history which he considered to be a ceaseless struggle between what he called "centrifugal" and "centripetal" forces. Bryce wrote of the strength and weakness of our federal system as accurately as a scholar can. But our neighbors, like ourselves, are living with this system and experiencing these strengths and weaknesses. These contending forces come to rest on the basis of some given formula such as our Constitution or some of our great constitutional decisions only for a short time.

⁷ Dates of adoption of constitutions now in force are: Argentina, 1853; Costa Rica, 1871; Guatemala, 1879; Colombia, 1886; Ecuador, 1906; Mexico, 1917; Chile, 1925; Peru, 1933; Uruguay, 1934; Honduras, 1936; Venezuela, 1936; Brazil, 1937; Bolivia, 1938; Nicaragua, 1939; Haiti, 1939; Salvador, 1939; Paraguay, 1940; Cuba, 1940; Panama, 1941; Dominican Republic, 1942.

A compact but comprehensive survey of legal institutions and doctrines is given in a series of lectures, *Law of the Latin-American Republics*, by Crawford M. Bishop, of the Law Library of the Library of Congress.

⁸ Professor Dowling at our last meeting pointed out the parallel between the constitutional problems of Argentina and the United States. The Argentinian Supreme Court in 1887 had exactly the problem Marshall dealt with in 1803 in *Marbury v. Madison*, and in 1876 faced the same issue Marshall decided in *McCulloch v. Maryland* in 1819.

New problems upset the old equilibriums and require resettlement. A series of these resettlements, whether made by amendments, or by judicial decision, or by legislative bodies, show the trends and drifts from which no government can isolate itself.

It is a commonplace observation that the pressures of economic and social maladjustments in the United States today are insistently and almost uniformly demanding the exercise of authority by central at the expense of local government. Even apart from the overshadowing war power, centripetal forces are in the ascendant. Many people are concerned lest these proceed too far or too rapidly. Other opinion here parallels that in Australia which Sir Owen Dixon has recently reminded us "has led some among us to doubt what is the place of federalism in the modern world."⁹ Both of these schools of opinion might be enlightened by dispassionate examination of the causes and consequences of different allocations of power between central and local authorities in different of the Americas. Colombia had a federal system from 1863 to 1886, but abandoned it. At some risk of oversimplification it may be stated that the more recent constitutions show an increased degree of centralization, having in general increased the central government's powers and multiplied the occasions for direct federal intervention in the government of constituent states.¹⁰ The American federated republics whose constitutions are easy of amendment and respond more quickly to current pressures and opinions are perhaps the greatest modern source of experience, whose lessons might help the United States to avoid both the evils of sectionalism and those of overcentralization.

⁹ 28 American Bar Association Journal 733.

¹⁰ The experience of Brazil is a case in point with respect to the recent history of federalism in some of the South American countries. At the outset Brazil's constitution provided for a system under which the powers of the federal government were strictly enumerated. The balance of governmental power rested in the states. They had their own constitutions, governors, and legislative assemblies, and in the course of evolution they attained a degree of independence and autonomy far beyond that in the United States. The situation became such that sectionalism began to become prevalent. Cf. Karl Loewenstein, *Brazil under Vargas* (1942).

However, by the decree of Nov. 11, 1930, the former constitution (of 1891) was suspended. The decree provided, among other things, that the chief of government might appoint for each state a federal delegate called the "Interventor." This is incorporated in Art. 9 of the Constitution of Nov. 10, 1937.

The Federal Government may intervene in the State, through the nomination, by the President of the Republic, of an interventor, who will assume, in the State, those functions which according to its Constitution, belong to the Executive Power, or those which, in accordance with the necessities and the requirements of each case, are given him by the President of the Republic:

(a) to prevent the imminent invasion of the National Territory by a foreign country or of one State by another, as well as to repel both forms of invasion;

(b) to reestablish order which has been seriously disturbed in those cases in which the State will not or cannot do so;

(c) to administer the State, when, for any reason whatsoever, one of its powers shall be prevented from functioning;

(d) to reorganize the finances of a State which has suspended, for more than two

And then there is the ever-difficult problem of reconciling liberty with authority, a problem which each nation must solve in setting up its own institutions, and the United Nations will have to solve in implementing the Atlantic Charter as an instrument of world peace. The equilibrium between restraint and freedom is always somewhat unstable, because the apprehension of dangers from war, for example, leads to increased emphasis on restraints, while fears of overcentralization tend to put the emphasis on liberty. Liberty is prized by all of the peoples of this hemisphere, and every country's constitutional history reveals important adjustments and readjustments to meet the needs of their condition and time. The constitutional history of this hemisphere is a veritable encyclopedia of experiments in liberty under law.

Another prevalent trend of the later constitutions of the countries in the south has been the incorporation directly into their constitutions of broad concepts of social welfare.¹¹ Our own practice has been to leave detail of this kind to be dealt with by the legislature, although some of our states have

consecutive years, the servicing of its funded debt, or which has failed to liquidate, after more than one year in arrears, the loan contracted with the Union.

(e) to assure the execution of the following constitutional principles:

1. republican and representative form of government;
2. presidential government;
3. rights and guarantees assured by the Constitution.

(f) to insure the execution of Federal laws and sentences.

The Interventor acts for his state as does the President for the Union. He is the executive authority of the union within the state and exercises jointly all legislative and executive powers. He may be recalled by the federal government. The mayors are appointed and dismissed by him.

Argentina is also making use of interventorship, but to a more limited extent. The power to appoint an interventor is given under Art. 6 of the Argentine Constitution of 1926.

The Federal Government intervenes in the territory of the Provinces in order to guarantee the republican form of government, or to repel foreign invasions, and, at the requirement of their constituted authorities, to support or reestablish them, should they have been deposed by sedition or invasion from another Province.

¹¹ Our Constitution refers in general to the protection of life, liberty, and property, whereas the Uruguayan Constitution of 1934 extends protection to "life, honor, liberty, security, labor and property, without distinction between citizens and non-citizens." Art. 7; *cf.* Art. 35 (52). It also provides social and economic guarantees on a large scale with respect to the family, public health and welfare, labor and education. Nor are these safeguards confined to Uruguay. We find them in the constitutions of some of the island republics and other countries on both the east and west coast of South America, as well as in Central America and Mexico.

The Uruguayan guarantees are summarized by George Jaffin in "New World Constitutional Harmony: A Pan-Americanian Panorama," 42 Columbia Law Review 523, 550.

Compare the comprehensive safeguards provided in Art. 43 *et seq.* and 60 *et seq.* of the Cuban Constitution of 1940. (See Jaffin, *op. cit.*, *supra*, p. 551, note 76.)

There are also safeguards provided directly in the Mexican Constitution (1917, see especially Art. 123), the Constitution of Brazil (1937), Venezuela (1936), Panama (1941), and Peru (1933). For further discussion of the Constitution of Peru, see Bishop, *Constitutional Law and Lectures on the Law of the Latin-American Republics*, p. 58.

lately gone a long way in the same direction. What experience will prove as to the wisdom of putting matters of this kind into fundamental instruments remains to be seen, but the distinction between constitutional and legislative provisions may be less important where amendment is easy.

In the field of administrative law and legal administration other governments of this hemisphere are engaged in trying out a variety of procedures with some of which we in the United States have little experience. As government tends to become more centralized and regulation becomes more extensive simple procedures for the prompt determination of constitutional and other legal rights claimed to be invaded by officials become more important. Administrative law has been highly developed under the civil law systems both in Europe and on this side of the Atlantic. Lawyers of the United States are not alone in solicitude for fair administrative procedures. Indeed we may hardly claim preëminence for the common law or our own statutes on this important subject. Cuba in its new Constitution not only provides a direct action to test the constitutionality of official acts but sets up a special court to decide such questions. Mexico and some others of the Hispanic states have a procedure under the name of *amparo* which provides a summary and direct test of the constitutionality and legality of official action at the suit of the injured party.¹² Others of the republics have under different names variations of these procedures.¹³ Canada may obtain an advisory judgment from its court of last resort on constitutional questions, a practice which our Supreme Court early rejected. Unfortunately, as our system operates, laws have sometimes been held unconstitutional after they have been in operation several years.

Of course it is impossible to appraise the results of any legal system, procedure, or rule of law on the basis of a paper acquaintance. A part, perhaps the most significant of any country's law, is the attitude it evokes in judges and administrators who apply it. We should not discount the wisdom, as related to laws and governments, of the precept that "What's best administered is best." But without going into fields of private law, which would further confirm the observation, it is evident that what our profession in each nation does and thinks is of interest to all lawyers everywhere. Professional relations between lawyers of the Americas must not merely be a by-product of commerce. We must meet each other on the level of disinterested and open-minded legal research and scholarship. The time may soon come when

¹² The "Law of Amparo" has been adopted also in El Salvador (1886, Art. 37, 102), Honduras (1925, Art. 29, 135), Nicaragua (1911, Art. 63, 124), and Guatemala (1935, Art. 34, 85).

¹³ Colombia has contributed a procedural machinery for protection of constitutional safeguards in the form of the "*acción popular*" or "*acción pública*" under which a private citizen may directly challenge the constitutionality of any law (1936, Art. 149). Cuba, Venezuela and Haiti have similar procedural safeguards. There is also a special procedure to handle appeals on questions of unconstitutionality in the form of the so-called "*recurso de inconstitucionalidad*." See Jaffin, *op. cit.*, *supra*, 567.

our educational institutions will regard instruction in our Anglo-American system incomplete unless it includes essentials of the parallel system of Romanic-American jurisprudence.

I have no thought of entering the controversy among academicians about the nature and the sources of that which we speak of as "the law." It is enough for the moment to recall that there is in the tradition and experience which we include under the name of "the law" a wisdom higher than that of any legislature or its statutes and more sure than that of any court or its decisions. "The law" is something that manages to serve both the stability of our society and its capacity for improvement; something that survives the mistakes of legislatures and courts; something that embodies great truths which will not be distorted for long to the selfish service of a client, a class, or even of a nation.

We may not well serve "the law," either common or civil, if our vision of our professional function be limited by the case in hand or confined to the segment of the profession's work carried on within any one nation. The advocate's danger of becoming preoccupied with the routine and the transitory is considerable, and gives point to the old story of the stonecutters who were asked what they were doing. The first workman gave the uninspiring, but very practical reply, "I am earning a living"; the second workman, without lifting his eyes from his immediate work, said, "I am cutting this stone"; but the face of the third lighted up as he said, "I am building a cathedral." We, too, whether or not we are aware of it, do more than earn livings; we do more than carry on particular cases. We are building the legal structure that will protect the altars of human liberty—the structure that will express man's faith in his worthiness and capacity to be free.

AN INTERNATIONAL POLICE FORCE

There is considerable talk about post-war arrangements and the desirability of an international police force. Among the most distinguished advocates of such a body to enforce peace on would-be belligerent nations is Mr. Lloyd George, who recently (January, 1943) declared his support of such a plan.

Although many people profess support of the idea of an international police force, it seems to this writer that there are many practical difficulties in establishing one, which together may probably prove insuperable. Some of these will be enumerated.

First: An international force presupposes some sort of a League of Nations to sustain and direct it. In establishing such a League, the initiatory Powers must exercise choice in issuing their invitations to others to join. A fault in Mr. Wilson's League was that all nations were invited to join on the basis of hope that all would wish to preserve peace; but it turned out that collective action was not practicable, and no one nation would take the responsibility. So nations entered and left the League as they pleased, and none could be

held to support others in a common policy to preserve peace. The League was able to take collective action only in subordinate affairs which aroused no serious opposition from anyone. The League did not undertake the great question of enforcing peace, for it was merely a diplomatic body, representing sovereign States, but without inherent strength of its own.

This war has shown that the nations of the world are divided into two types: the aggressive ones, Germany, Japan and Italy; and the allied opponents of the Axis, who desire peace and yet perceive the wisdom of not unduly oppressing those who precipitated the war after they have been overcome. This type of nation, the equalitarian type, can alone be admitted to any League to preserve peace. Perhaps many nations will not be thought worthy to join because they are practical isolationists, for themselves alone; willing to profit by the sacrifices of others. It is, therefore, probable that any future League to preserve peace will consist of a few members, strong both economically and militarily, who will treat all, including the Axis nations, as generously as safety will permit.

Second: A League for Peace will have difficulty in recruiting its police force. Several questions will arise; among others, from what nations will the officers and enlisted men be acceptable? Will the members renounce their nationality and citizenship? On taking their oath of office, to whom will they pledge loyalty and obedience? Will it be to the force commander, as the Roman legions did to Caesar, or to the group of nations composing the League? To what authority will be committed the power of military discipline which is needful to control armed men? A secondary point comes up as to the emplacement of this international force. No country will wish to have on its territory an armed body which it does not control. It will therefore be necessary to base this international force permanently in Axis territories whose aggressive tempers bring the force into existence. Perhaps the most doubtful point about such an international force will be its degree of loyalty to its employers, for the usual springs of patriotism are not available in this case. The love of country and of one's fellow-citizens, if not instinctive, is developed very highly in the early life of all. Perhaps the members of this police force might not be able to subdue their patriotism entirely in case they should be called upon to act against some member of the League if they should think such action incompatible with the interests of their own country.

Third: The mode of payment of such an international force will not readily be agreed upon. According to the old proverb, he who pays the piper calls the tune. But it is a principle of international law that sovereign Powers stand on an equality with one another. Weaker Powers will desire an equal voice in the management of the international force and yet be unwilling to contribute equally to its maintenance. Probably the financial cost of the police force would be placed on the defeated nations which could well afford it, as they would be allowed no armies of their own.

Fourth: By what code of rules will the international police be guided? How shall such a code be drawn up? How can all the members of the League be brought to agree on the application of the code in each case that may seem to require action? It seems that the great economic and military nations will not consent to let their strength be directed by the majority vote of small States. So a satisfactory solution seems to call for a sacrifice of some part of their sovereign powers on the part of all members of the League.

Fifth: If such is the case, the most important point in the formation of any effective league to wield an international army is to decide to what extent and in what direction the member States must sacrifice some of their individual sovereignty in order to secure unity, certainty and promptness in the application of their international force. In other words, what authority must the super-state be granted in order to exercise proper control over its army?

This writer does not believe that the super-government can be effective unless it deals directly with the individual citizens who make up the component States of the League for Peace. For this opinion he relies on the early history of this country, beginning with the Second Continental Congress, which declared the independence of the United States and the following year adopted "Articles of Confederation and Perpetual Union." By these articles the assembled States declared (Article 2) that "each State retains its sovereignty, freedom and independence." Thereafter, Article 3 declared "the said States hereby enter into a firm League of friendship with each other." Article 8 provided that "all expenses that shall be incurred for the common defense and general welfare and allowed by the United States in Congress assembled shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to . . ." Article 9 conferred authority upon a committee of Congress to "build and equip a navy, to agree upon the number of land forces and to make requisitions on each State for its quota."

Under these and other articles not infringing state sovereignty, Congress waged war, made alliances and accepted money loaned by foreign Powers. But as the States surrendered none of their sovereign authority, it is apparent that the Congress, like the League of Nations of 1919, had only diplomatic status without inherent strength of its own. Nevertheless, as long as the Congress had the sole objective of prosecuting the war, this diplomatic form of union was able, although with difficulty, to accomplish its task.

After the peace of 1783, the "perpetual" union of 1777 was no longer satisfactory, for it had no more solid basis than a treaty. Many points of divergent interests among the thirteen sovereign States arose, and, although all wanted to remain united, a satisfactory union could only be made by some sacrifice of individual sovereignty on the part of each State. This was accomplished by the Federal Constitution of 1789, which created a super-government which dealt with individual citizens of the hitherto sovereign

States, taxing them personally, putting them in jails of its own for offenses against federal laws, and drafting them into the Army if need be.

It is difficult to imagine any other form of sacrifice of State sovereignty which would be effective in enabling some League of Nations to maintain an armed force to repress indications of aggressiveness on the part of any suspected nation, or enable the declaration of the League to compel the obedience of any recalcitrant nation of the League itself. If the thirteen United States could not attain unity of action without a super-government, in spite of their common history and institutions, it will be a far more difficult matter to get joint action from many States differing widely in language and institutions. For States, as such, are uncontrollable by law. As collective bodies of citizens in opposition to other similar bodies, they may be brought into harmony only by diplomacy. After that fails, war is the only recourse. It is a truth, although a paradox, that law has no sustaining force of its own. When offenders challenge the law it can be restored to authority only by force, yet force without law is war. This statement applies whether the offender is an individual or a nation, unwilling to agree with others.

If, as suggested in this discussion, it is admitted that an international armed force to preserve peace is impracticable, we must revert to the old rule of balance of power to rule the world in the future, as it did with some partial success during the greater part of the 19th century. When the allies shall succeed in bringing the present war to a successful end, the diplomatic union of the four great Powers, the United States, the British Empire, Russia and China, without any sacrifice of their separate sovereignties, must maintain a lasting peace by occupational armies in the conquered aggressive States, permitting them no rearmament. The cost of occupation should be assessed against the conquered States; which otherwise should have equal economic opportunities, and should not be oppressed, for that would raise more discontent than is desirable.

Some idealists may say that the victors would abuse their strength, but that is a risk which must be incurred as the lesser evil.

W. L. RODGERS

THE MUNICH "REPUDIATION"

Publication in the January number of this JOURNAL¹ of notes concerning the policy of Great Britain in regard to Czechoslovakia, hailed far and wide as a repudiation of the 1938 Munich arrangement, calls for at least a brief analysis of the documents and their meaning. Do they in any real sense constitute a repudiation of the Munich *diktat*?

The important part of Mr. Eden's note, dated August 5, 1942, and addressed to Mr. Jan Masaryk, is contained in the declaration that "as Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938, in which His Majesty's Government in the United

¹ Vol. 37, p. 2.

Kingdom participated, His Majesty's Government regard themselves as free from any engagements in this respect" and that "at the final settlement of the Czechoslovak frontiers to be reached at the end of the war they will not be influenced by any changes effected in and since 1938."

It will be noted at once that the declaration of Mr. Eden does not repudiate the Munich deal because it was contrary to international law and contrary to all enlightened conceptions of international morality, and because the relinquishment of Sudetenland was not approved in accordance with the Czechoslovak Constitution, requiring consent of Parliament to cession of territory; but solely on the ground that the Munich fiat was destroyed by Germany. It may well be asked whether this can be construed as a full and complete repudiation of one of the most questionable transactions of recorded history and all its consequences. Moreover, Mr. Eden's statement lends itself to the construction that Great Britain might have been willing to stand upon Munich had not Germany proceeded to a complete destruction of Czechoslovakia to which Munich was an obvious preliminary.

Not only does Mr. Eden's letter fail to reject Munich *in toto*, but if it means anything, it means that the British Government considers open the whole Sudetenland question and, indeed, the whole problem of Czechoslovak boundaries. It throws open to revision the territorial arrangements made in Paris in 1919 with regard to Central Europe, and, from that point of view, instead of being a stabilizing factor, becomes an unsettling influence and makes for further confusion in Central Europe.

From the reply of Mr. Jan Masaryk to Mr. Anthony Eden, also dated August 5, 1942, it is apparent that the Czechoslovak functionaries in London were not completely satisfied with Mr. Eden's note, because Mr. Masaryk's communication recites that, while the British Foreign Secretary's note is accepted "as a practical solution of the questions and difficulties of vital importance for Czechoslovakia," Masaryk's London organization maintains its "political and juridical position with regard to the Munich agreement and the events which followed it. . . ."

The Czechoslovak contention has always been that the Munich arrangements are completely void and that Czechoslovakia juridically continues to exist in its pre-Munich form. In the belief of this writer the position is sound, as a matter of international as well as constitutional law, except of course that by pre-Munich form is to be understood the existence of Czechoslovakia as an international person. No reference is made to such internal constitutional changes as Slovak autonomy—not secession!—or the occupancy of the presidential chair, which took place before the seizure of Prague. These matters cannot be of international concern.

The French National Committee, of London, in a letter of September 29, 1942, signed by General Charles de Gaulle and countersigned by M. Dejean, National Commissioner for Foreign Affairs, and addressed to Monsignor Jan Šrámek, designated as Czechoslovak Prime Minister, also rejected the

Munich agreement. As matters stand at the moment, legal significance can hardly be attributed to the declaration and its political value is not at all certain. However, it does furnish a measuring rod for judging what the London Czech group sought also to obtain from the British and how the British statement falls short of Czech desires. After calling attention to the friendship which always existed between the Czechoslovak and French peoples, the French document proceeds to say that "in this spirit the French National Committee, rejecting the agreements signed in Munich on September 29, 1938, solemnly declare that they consider these agreements as null and void as also all acts accomplished in the application or in consequence of these same agreements. Recognizing no territorial alterations affecting Czechoslovakia supervening in 1938 or since that time, they undertake to do everything in their power to insure that the Czechoslovak Republic within frontiers prior to September, 1938, obtains all effective guarantees for her military and economic security, her territorial integrity, and her political unity."²

The de Gaulle pronouncement thus clearly contemplates restoration of Czechoslovakia in its pre-Munich boundaries and brings into clearer relief the fact that Mr. Eden's message to Mr. Jan Masaryk does not do so. What General de Gaulle means by "all acts accomplished in the application or in consequence of these same agreements" and by "political unity" is not defined. If he refers to internal Czechoslovak problems, such as decentralization of the governmental structure, or the present claims of former incumbents to offices vacated while Czechoslovakia, though mutilated by Munich, was still an independent State, then, of course, we are dealing with a new departure in the conduct of international relations. Heretofore such matters have been considered as purely internal and outside the range of international concern.

The British declaration, which obviously is of major importance, appears to be a wholly unilateral act of His Majesty's Government. As yet there has not come to light any evidence which would warrant one in assuming that other Allied countries take the view that, following an Allied victory, all of Central Europe is to be returned to the melting-pot. That a stand of this kind complicates, rather than simplifies, permits hardly of any doubt. Yet simplification seems to be called for. A quest for simplification leads to the thought that the first post-war task should be the undoing of all results of aggression and restoration of the pre-aggression international status without interference in purely domestic affairs of the liberated countries. This would not necessarily mean, and should not mean, a petrification of the international order. Provision could be made for subsequent elimination, after mature consideration and investigation, of international areas of friction.

CHARLES PERGLER

² The Inter-Allied Review, Oct. 15, 1942.

THE DEPARTMENT OF STATE IN WARTIME¹

Participation by the Department of State in the war effort has had a marked effect on the organization and functions of the Department. The most obvious change has been the inevitable increase in personnel. In 1932 there were 833 employees in the Department of State; this number has now grown to more than 2,500. New divisions and offices have been created and older divisions have expanded to handle problems arising out of the war and the entry of the United States into the conflict in December 1941. The *Bulletin* has carried announcements of the establishment of these new offices.

More significant, although less obvious, have been the broadened scope of the Department's activities and the changes in methods of operation and procedure in the Department as a whole.

The Department's normal governmental contacts have broadened to cover associated activities of all other Government agencies and involve close technical relations with the agencies and interdepartmental policy groups participating in the war effort. For two principal reasons the Department of State is associated in the operations of these agencies: First, it is the department primarily responsible under the President for the conduct of our foreign relations; and, secondly, the Foreign Service forms the official channel between this government and foreign governments. Thus participation by the Department at two points in all international operations is required: it must coördinate, in the foreign-relations field, the many complex war activities of other departments and agencies, including a number of war emergency agencies; and it must, in large part, furnish the means of carrying out these activities so far as they require action in foreign countries. The effective discharge of these responsibilities by the Department has a vital bearing upon the success of the war effort.

In many cases other agencies must depend upon the Department not only for coördinating their activities in the foreign relations field with foreign policy considerations but also for the specific information upon which their operations must be based. For example, the Liaison Office in the Office of the Under Secretary of State expedites the consideration of and action upon urgent politico-military questions of common interest to the State, War, and Navy Departments and operates as part of the Secretariat of the Liaison Committee, composed of the Under Secretary of State, the Chief of Staff, and the Chief of Naval Operations. The Office receives urgent communications or inquiries from and transmits to the War and Navy Departments, and often to such military bodies as the Inter-American Defense Board, despatches and daily technical reports of a confidential nature from our diplomatic missions and consular offices abroad, which are essential to the proper functioning of certain military and naval operations.

Similarly, the four Advisers on Political Relations maintain close relations with other Government agencies; the work of the adviser on Far Eastern

¹ Reprinted from the Department of State Bulletin, Oct. 24, 1942, Vol. VII, p. 855.

affairs, for example, includes participation as a member of the Subcommittee of the Joint Intelligence Committee of the Joint Chiefs of Staff, which Subcommittee processes material, evaluates information, and prepares recommendations for the use of the Joint Chiefs of Staff; collaboration with the Lend-Lease Administration and with the Administrative Assistant to the President charged with duties relating to the furnishing of lend-lease and other assistance to China; consideration of policy in collaboration with the Division of Defense Materials in the Department and with the Board of Economic Warfare in obtaining strategic materials from China; collaboration with the Division of Current Information and with appropriate officials of the War and Navy Departments, the Office of War Information, and the Office of Strategic Services in planning psychological warfare; and cooperation with the Department's Division of Cultural Relations and with the Office of War Information in the formulation of plans and the preparation of material for dissemination in China, designed to promote understanding and the interchange of culture between the American people and the Chinese.

Many situations involve not only the interplay of political and military considerations but also decision and action in the economic field by several of the interested agencies. Just prior to the United States' entry into the war the Secretary of State set up the Board of Economic Operations, composed of certain officials and six divisions in the Department, for the purpose of coordinating the general economic foreign policy of this Government, and, in particular, the program of economic warfare. This program requires collaboration with numerous officials of the United Nations and with such international agencies as the Combined Shipping Adjustment Board, the Combined Raw Materials Board, the Inter-American Development Commission, and the Inter-American Financial and Economic Advisory Committee, as well as the correlation of the programs of such United States Government agencies as the Board of Economic Warfare, the War Production Board, the Office of the Coordinator of Inter-American Affairs, the Reconstruction Finance Corporation, the War Shipping Administration, the Export-Import Bank, and others.

In the program of psychological warfare the Department, through its Division of Current Information in collaboration with the Division of Cultural Relations and the geographic divisions of the Department, works in liaison with other agencies in the war information field, including the Office of War Information, the Office of Censorship, the Office of the Coordinator of Inter-American Affairs, and the Joint Psychological Warfare Committee of the Joint Chiefs of Staff, in planning and directing psychological warfare in various parts of the world by means of the radio, the press, and motion pictures. The Department supervises the use of informational material, conforming to our general foreign policy, which will be suitable for dissemination by our diplomatic missions in countries outside of the Western Hemisphere; furnishes recommendations to the Office of War Information based on reports

from the field; and studies reports on enemy propaganda and intelligence activities in the American republics.

The embassies, legations, and consular offices in the Foreign Service have necessarily become the headquarters or centers of wartime activity in all countries with which we maintain diplomatic relations. An Auxiliary Service has been created on a temporary basis to supplement the permanent Foreign Service staff in handling new responsibilities created by the war and in serving other Government agencies, such as the Board of Economic Warfare, the Office of Strategic Services, the Lend-Lease Administration, the Office of the Coördinator of Inter-American Affairs, and the Office of War Information, whose operations relating to foreign countries are of major interest to the Foreign Service establishments in those countries. In 1932 there were fewer than 4,000 persons in the Foreign Service; now, the personnel of the Foreign Service, including the members of the new Auxiliary Service, totals more than 4,500.

In addition to its broad rôle in coördinating economic and political action relating to foreign policy and in maintaining the foreign outposts of this Government, the Department directly is charged with a number of duties closely related to the war. An example of this is the designation of the Secretary of State to prepare the Proclaimed List of Certain Blocked Nationals, with the coöperation of other agencies. Similarly, the Department has broad responsibilities with respect to the representation of the United States in intergovernmental committees, an example of which is the Inter-American Financial and Economic Advisory Committee, of which the Under Secretary of State is the delegate of the United States and the chairman. The Department's efforts in the promotion of hemispheric solidarity have been intensified, and these efforts have been implemented by meetings of the Foreign Ministers of all the American Republics, such as the meeting held at Rio de Janeiro in January 1942, to insure full coöperation in joint problems of defense.

A detailed survey of the functions of one of the long-established divisions of the Department of State, such as the Division of the American Republics, reveals a diversification of duties which requires experts with first-hand knowledge of conditions in every field of social, political, and economic activities in those countries in order to handle the complexity of problems related thereto.

This Division has charge of coördinating relations with the 20 other American Republics and with inter-American organizations and directs a greatly expanded program of coöperation and solidarity between the United States and these nations.

In the field of political warfare, the Division of the American Republics studies reports of non-American and enemy activities in the hemisphere, including political penetration, radio and press propaganda, economic penetration by agreements and concessions, fifth-column activities, espionage,

use of telecommunications, etc. Suggestions and recommendations for counteracting and eliminating such activities, requiring familiarity with foreign methods of secret intelligence, are a frequent result.

The Division maintains liaison with the Pan American Union, the Inter-American Defense Board, and the Coördinator of Inter-American Affairs, among others, on a variety of social, cultural, political, and defense problems, and with the Divisions of Cultural Relations and Current Information of the Department. Contacts with high officials, visitors, and members of the diplomatic corps of the other American Republics are frequent and essential. This Division studies political developments arising from inter-American conferences and coöperates with other divisions and offices of the Department in handling matters relating to various treaties and agreements, such as water and boundary settlements, the Inter-American Highway, the Inter-American Coffee Agreement and negotiations for the Inter-American Cocoa Agreement, and the International Sugar Agreement; agrarian cases; immigration and protection; aviation developments; commercial relations; and export control and priorities. Officers of this Division analyze and prepare digests covering reports from the Foreign Service in the other American Republics and from Army and Navy officers attached to these missions; study and observe current trends and developments—political, economic, and social—in these countries; and prepare instructions to the Foreign Service in accordance with the policies of the Department. The Division renders technical assistance in connection with the detail to the other American Republics of military, naval, and air missions; reviews with special attention to the effect upon the Department's policy all material for the press and other modes of publication, including radio scripts and motion-picture newsreels, having reference to the other American Republics. As may be seen, the responsibilities of this Division, as well as others in the Department, cover virtually every aspect of life within the regions to which its work is directed.

The rôle of the Department of State, so highly important in time of peace, is even more vital in time of war, since its vigorous conduct of our foreign relations in the political, economic, social, cultural, and administrative fields comprises one of the most effective means which the United States possesses, not only for combating the Axis Powers but for insuring and continuing long-term friendships with the other nations of the earth.

REGIONALISM IN INTERNATIONAL JUDICIAL ORGANIZATION

Proposals are made from time to time, and have again been current recently, for the establishment of regional international courts which it is alleged would be more readily available for litigation between States of the same region of the world than the Permanent Court of International Justice or any other world tribunal. In the past such proposals have been made chiefly in connection with the International Conferences of American States. More recently a regional international court for the Pacific area has been

suggested. Some of the advocates of a European or West European "federation" have adumbrated the establishment of a regional international court in Europe. The future of international judicial organization is clearly among the questions which will require thorough reconsideration on the morrow of the war, and a brief discussion of some of the problems which the creation of regional international courts would present may therefore be of interest.

The coëxistence of the Permanent Court of International Justice and of entirely independent regional international courts would involve at least two dangers. There would be a danger of conflicts regarding jurisdiction, and a danger that regional courts might be inspired by regional legal conceptions to such an extent that their decisions might prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of world-wide validity are desirable.

Assume that the Permanent Court of International Justice and an entirely independent regional international court were both to enjoy, in greater or lesser degree, compulsory jurisdiction in respect of the same subject-matter and between the same parties. There would then, unless adequate arrangements for coördination existed, be a danger of conflicts regarding jurisdiction which would tend to discredit both courts. One party to a case might apply to the Permanent Court and the other party to the regional court. Each court might decline to regard its jurisdiction as excluded under the rules governing its competence and procedure by the fact that the other party had applied to the other court. Such a conflict might arise at an early stage of the proceedings. The Permanent Court, acting under Article 41 of its Statute at the request of one party, might indicate one set of measures of interim protection; the regional court, acting in exercise of similar powers at the request of the other party, might indicate measures of interim protection incompatible with those indicated by the Permanent Court. Even more delicate would be the situation if both courts gave judgment by default and did so in opposite senses. Adequate arrangements for resolving any conflicts regarding jurisdiction which might arise would therefore be essential in the event of the creation of any regional courts.

There are, of course, numerous cases in which jurisdiction has been attributed to the Permanent Court conditionally upon the parties not having agreed, in respect of the particular dispute or class of dispute in question, upon reference to some other body. A statute conferring jurisdiction upon a regional court in general terms was not the type of agreement for another jurisdiction contemplated when the clauses and reservations embodying this condition were drafted. Such a statute would, however, probably be regarded by the Permanent Court as effectually excluding its jurisdiction under instruments and between parties as regards which there are in force clauses or reservations excluding cases in which the parties have agreed to accept some other jurisdiction. But in other cases the Permanent Court would seem to have been

invested with an exclusive jurisdiction under circumstances which would make it impossible for it to give effect to any agreement between particular States purporting to substitute for its jurisdiction that of some other body. Thus Articles 29 to 34 and 37 of the Constitution of the International Labor Organization confer upon the Permanent Court jurisdiction in respect of questions relating to the interpretation and application of the Constitution of the Organization and of international labor conventions. It would seem impossible for the Permanent Court to give effect to any subsequent agreement between a limited number of members of the International Labor Organization purporting to confer upon another body a rival jurisdiction in respect of matters jurisdiction relating to which is vested in the Permanent Court itself by the constituent instrument which brought into being the International Labor Organization.¹ An even stronger case is that of the Geneva Opium Convention, 1925.² This convention contemplates the jurisdiction of arbitral tribunals as an alternative to that of the Permanent Court in certain circumstances; but it specifically provides for the reference to the Permanent Court of questions of international law or of the interpretation of the convention in respect of which either party claims, and the arbitral tribunal finds, that a decision by the court is necessary for the settlement of the dispute. Future instruments are likely to continue the practice of conferring exclusive jurisdiction upon a world court in certain cases. Now it is inconceivable that the Permanent Court could regard its jurisdiction as being excluded by the statute of a regional court in this type of case. The avoidance of conflicts regarding jurisdiction in such cases can best be achieved by including in the statutes of any regional courts organic limitations of their jurisdiction. A refusal by the Permanent Court to exercise jurisdiction on the ground that the parties have, by accepting the statute of a regional court, agreed to accept the jurisdiction of that court, would not be an appropriate method of dealing with the situation. Nor is there any reason to suppose that the Permanent Court would refuse to exercise jurisdiction in such cases on this ground.

The second danger to be guarded against is the possibility that the decisions of regional courts might tend to crystallize discordant regional conceptions of the content of international law in respect of subjects regarding which common worldwide rules are desirable. No one can glance through such a publication as the *Annual Digest of Public International Law Cases* without being impressed by the number of unsettled points in even those parts of international law which have suffered least from our failure hitherto to establish adequate arrangements for the maintenance of international public order. The unifying influence of a single supreme court is one of the indispensable conditions of the development of an effective and comprehensive

¹ Cf. also Air Navigation Convention, 1919, Art. 37, Hudson, *International Legislation*, Vol. I, p. 359.

² Art. 32, *ibid.*, Vol. III, p. 1589.

worldwide system of international law. A reference to one particularly difficult branch of the law will illustrate the point. If all the unsettled questions concerning State responsibility, agreement upon which could not be secured at the Hague Codification Conference in 1930, were to be decided in one sense by the Permanent Court of International Justice and in another by a regional court—which is far from being inconceivable—an important chapter of classical international law would be emptied of a large part of its usefulness. As regards certain questions, there is legitimate scope for regional rules of international law. An obvious illustration is the *uti possidetis* of 1810 rule, which is the basis of the distribution of territory between the Latin American Republics. Such rules are, however, of relatively small and of decreasing significance.

It is therefore submitted that if, when the time comes to reconstruct the existing international judicial machinery, an adequate case is thought to have been made out for establishing any regional international court or courts, any such court or courts should be established only under conditions which afford ample guarantees against the dangers which have been indicated. A rational distribution of authority between the Permanent Court and regional courts is not impossible if three conditions are fulfilled: proper arrangements for coördination must be planned in advance of the creation of any regional court; the jurisdiction of all such courts must be suitably limited by the terms of the instruments constituting them; and the status of such courts in relation to the Permanent Court must also be suitably defined in their constituent instruments. Some preliminary suggestions concerning the type of demarcation of authority which would be appropriate may be of interest.

No demarcation of authority is likely to be satisfactory unless it is based on a frank recognition of the superiority of world to regional bodies in respect of all questions not of exclusively regional importance. Acceptance of this principle involves two main conclusions: regional courts should be courts of limited rather than of general jurisdiction, and the Permanent Court of International Justice should have exclusive competence to determine any disputes regarding jurisdiction between itself and regional courts.

The required limitation of the authority of regional courts might be effected partly by excluding certain matters from their jurisdiction altogether. The most obvious illustration of such matters is afforded by disputes relating to the interpretation or legal effect of treaties or other instruments to which States outside the area of the regional court are (or perhaps one should say "may be") parties. It may be thought that in cases in which the Permanent Court is already granted exclusive jurisdiction by some existing instrument the provisions of which could not be validly modified as between a limited number of the parties thereto, it would not be necessary as a matter of strict law that the statutes of regional courts should include express provisions excluding such cases from their jurisdiction. Any deci-

sion given by a regional court in such a case would, it may be argued, be unauthoritative simply because the statute of the regional court could not prevail against an earlier world instrument conferring exclusive jurisdiction upon the Permanent Court. The regional court might, however, not regard the fact that its decision would be unauthoritative in this sense as implying that it ought not to proceed with a case if such a case appeared to fall within its jurisdiction as defined by its own statute. It would therefore seem desirable that the statutes of any regional courts should in express terms exclude such cases from their jurisdiction.

A provision to this effect is equally desirable, though on different grounds, in respect of cases relating to the interpretation or legal effect of treaties or other instruments not limited to the region in the case of which the Permanent Court has not already been granted exclusive jurisdiction. In such cases no question arises of a regional court entrenching upon the exclusive jurisdiction of the Permanent Court as regards the instrument in question. The fact that the Permanent Court has not exclusive jurisdiction implies, however, that the decisions of the regional court will be authoritative as between the parties. The danger is therefore accentuated that different interpretations of the instrument may be adopted by the Permanent Court and the regional court in different proceedings. This danger can best be avoided by excluding entirely from the jurisdiction of regional courts all questions relating to the interpretation or legal effect of treaties or other instruments to which States outside the region are or may be parties.

A question of this kind may be the gist of a case, or may arise incidentally in the course of the proceedings. Where such a question is the gist of the case, jurisdiction over the whole case should be reserved to the Permanent Court. Where such a question arises incidentally, the jurisdiction of the regional court need not be regarded as completely displaced, provided that there is some procedure whereby the question regarding the interpretation or legal effect of the treaty or other instrument can be referred for decision to the Permanent Court.

It would appear improbable that there are any analogous grounds for giving to regional courts an exclusive jurisdiction in respect of other types of case. If this view be accepted, the Permanent Court and any regional court would have potential concurrent jurisdiction as regards all cases other than those reserved to the exclusive jurisdiction of the Permanent Court, subject to a right of appeal from the regional court to the Permanent Court in certain circumstances.

The general principle applicable for resolving any conflicts of jurisdiction would be that the jurisdiction of the Permanent Court would take precedence of that of regional courts. It would be necessary to have detailed rules defining the effect of any agreement between the parties to a case reserving jurisdiction to a regional court, and prescribing the stage at which and manner in which a preference for proceedings in the Permanent Court must be invoked so as to operate to bar further proceedings in the regional court.

In order to reduce to a minimum the danger that the existence of concurrent jurisdiction might cause prejudice to the unity of international law, there should be provision for an appeal from any regional court to the Permanent Court whenever an important question of international law is involved. Since the object of permitting such appeals would be to safeguard the unity of international law, no right of appeal would be necessary on questions of fact. Appeals concerning the reasonableness of reparation awarded would be necessary only in cases involving some general principle of the law of the measure of damages. There are also certain questions of law regarding which no appeal would be necessary. There are likely to be cases in which the only points of law raised relate to principles of international law of exclusively regional application, to some system of municipal law, to a question of no general interest arising in connection with an instrument to which no State outside the region is or can become a party, or to a question of procedure or practice before the regional court. Nor would an appeal be necessary if the regional court had confined itself to applying international law as previously laid down by the Permanent Court and there were no special grounds for reconsideration by the Permanent Court of its earlier decision. The Permanent Court alone could properly judge whether a case fell within any of these exceptions. It would therefore be necessary to have some procedure whereby application could be made to the Permanent Court for leave to appeal in cases in which the applicability of one of these exceptions arose. On all other questions of law there should, it is submitted, be an appeal to the Permanent Court as of right.

Provision for the enforcement of these principles regarding the demarcation of jurisdiction between the Permanent Court and regional courts could most appropriately take the form of the attribution to the Permanent Court of a supervisory jurisdiction over regional courts designed to enable it to safeguard its authority. The Permanent Court should, it is submitted, be given for this purpose the following powers:

- (a) power to require any regional court to suspend all proceedings in any case—
 - (i) if the case falls within the exclusive jurisdiction of the Permanent Court; or
 - (ii) if the Permanent Court and the regional court have concurrent jurisdiction in respect of the case and proceedings relating thereto have been duly initiated before the Permanent Court;
- (b) power to make an order transferring a case from a regional court to the Permanent Court in certain defined circumstances;
- (c) power to require a regional court to refer to the Permanent Court for decision some special point arising in the course of a case.

It is reasonable to hope that if these powers existed it would be necessary to exercise them only in exceptional cases. The ordinary practice would doubtless be for the regional court to take itself such action as might be

necessary to avoid any encroachment upon the jurisdiction of the Permanent Court. It should refuse to entertain any case brought before it in respect of which the Permanent Court had exclusive jurisdiction or was already exercising concurrent jurisdiction. It should discontinue all proceedings in any case in respect of which it had concurrent jurisdiction if alternative proceedings relating thereto were duly initiated before the Permanent Court. If in the course of a case the emergence of some unanticipated point, or intervention by some new party, made it desirable to refer the new point or transfer the whole case to the Permanent Court, the action necessary for this purpose should normally be taken upon the responsibility of the regional rather than upon that of the Permanent Court. It is none the less desirable that the Permanent Court should have the supervisory powers necessary to enable it to enforce its authority upon regional courts whenever these do not comply spontaneously with the limitations upon their jurisdiction which it has been suggested ought to be incorporated in their statutes.

The suggestions presented in this paper are not intended as advocacy for the establishment of regional international courts. No attempt has been made to consider here some of the more serious objections to the establishment of regional courts, such as the considerations that a world court will generally give greater guarantees of impartiality than any regional court and that the state of the international judicial calendar during the inter-war period would not justify any increase in the international judicial establishment, otherwise than by the establishment of specialized tribunals such as the international courts of piepowder which have been advocated by Sir Cecil Hurst, until there has been a considerable increase in the amount and importance of international judicial business. Assuming, however, that the movement for the establishment of regional international courts continues to show a certain vitality, and that at some stage the establishment of one or more such courts should be thought desirable, it is upon the above lines, it is submitted, that a constructive approach should be made towards the solution of the problems which the establishment of regional courts would create.

C. WILFRED JENKS

NATIONALITY IN INTERNATIONAL LAW

The word "Nationality" does not mean what it says, nor does it say what it means. Etymologically it would mean the condition of belonging to a nation, of being a national. In international law "nations" are an unknown quantity. A nation is a conception of municipal law and means a group of persons who through racial, religious or economical ties are bound together to follow a common pursuit.

The word "national," as used in international law, has a technical meaning. The law of nations or public international law is the law prevailing between States. A State is a political conception which may comprise a number of nations, like Great Britain which is constituted of three nations

or four, if Northern Ireland is included, or the U.S.S.R. which consists of some 60 or 70 nations. The word "national" is used in connection with a State and then means a member or a subject of such State. An individual who is a national of a State is internationally only known through the State to which he belongs. Nationality, that is to say, membership of a State, is the link through which an individual can enjoy the benefits of the law of nations.¹ Nationality is intended as a conception of municipal law. From the standpoint of public international law it is for each State to decide who shall, and who shall not, be admitted as a member.

In private international law "nationality" is used as a basis for the solution of conflicts of law. In countries where nationality is not such a criterion, "domicil" is used for the same purpose. These expressions, in the same way as *jus soli* and *jus sanguinis*, are used in private international law and have no relation to questions attached to nationality in the law of nations or public international law.

Individuals are objects of the law of nations. It is only through the medium of their nationality, that is to say, their being members of a State, that individuals can enjoy benefits from the law of nations. Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, since there is no State which would be competent to take their case in hand.²

The State therefore holds the ultimate decision whether any individual shall be entitled to enjoy any, and what, rights as a member of the community of nations or be considered an outcast in a political sense as being a stateless person. As no two States legislate alike on the subject of admission of individuals as members or of releasing them from the bond which attaches them to the State, and moreover circumstances which are the outcome of war or revolution cause cession of territory or State dismemberment, a variety of conditions is created which render certain individuals stateless and give others more than one nationality with all the consequences emanating therefrom.

In addition, in modern times, totalitarian States have by denationalizing masses of their citizens, created large categories of stateless persons.

Several attempts have been made to overcome the difficulties caused by the above-mentioned lines of thought, and to regularize the situation. In principle, as pointed out by the *Institut de Droit International*, every individual should have one, and only one, nationality. If the early realization of such theory appears impossible, certain rules might be adopted to simplify matters. In 1930 a conference held at The Hague on the progressive codification of international law attempted to regulate the issue by drawing up rules to cope with the situation. As a result of the work of its First Committee, the Conference adopted:

¹ Oppenheim-Lauterpacht, *International Law*, 5th ed., Vol. I, Para. 291, p. 508.

² Oppenheim-Lauterpacht, *op. cit.*, p. 508.

- (a) a Convention concerning certain questions relating to the Conflict of Nationality Laws;
- (b) a Protocol relating to Military Obligations in certain cases of Double Nationality;
- (c) a Protocol relating to a certain case of Statelessness, and
- (d) a special Protocol concerning Statelessness.³

In the preamble to the Convention the high contracting parties declared that it was in the interest of the international community to secure that all its member States should recognize the desirability that every person should have a nationality and one nationality only; and that the efforts of humanity should be directed towards the ideal in this domain, *viz.*, the abolition of all cases both of statelessness and of double nationality. The parties were of opinion, however, that under the economic and social conditions which then existed in the various countries, it was not possible to reach an immediate uniform solution of all the problems connected with nationality and statelessness. The convention and the protocols deal with the various difficulties created by the existing conditions and provide rules to deal with these in an approved manner.

By making attempts at regularizing what in point of fact is unnatural, and by adhering to conceptions which have become outgrown by human development, we fail to make progress. The conception of States as subjects and individuals as objects of the law of nations seems to ignore the fact that States, after all, are built up by individuals and that the well-being of the individual is the principal aim of all legislation and international intercourse.

St. Augustine, in his *Epistolae* 138.10,⁴ reminds us of the human element of States: *Quid enim est respublica nisi res populi? Res ergo communis, res ubique civitatis; quid autem est civitas nisi hominum multitudo in quoddam vinculum redacta concordiae?*

C. B. Fawcett, in the *New Commonwealth Quarterly* of January, 1942, defines a State as "a human group based on the need of civilized men for an organization which will maintain and defend their civil rights and liberties."

To recognize public international law as a law between States without taking the individuals into consideration who constitute the State is no longer considered acceptable as a doctrine. The character of sovereignty has given the State an abstract identity separate from the human group of which it consists. The State has become a superstructure which dictates the individuals of whom it is composed. It decides who shall be its nationals and assumes powers without being responsible for the exercise thereof.

³ The convention and the three protocols came into force in 1937 following upon the receipt of the tenth ratification. The States bound by the convention are: Brazil, Great Britain, Canada, India, China, Monaco, The Netherlands, Norway, Poland and Sweden.

⁴ Ed. Goldbacher, III, 135.

In the words of Professor Julian S. Huxley,⁵ "The State as something of value in its own right is an unreal abstraction; and when, as in Nazi Germany, it is erected into something of higher value than the individuals who compose it, it becomes a false and dangerous one."

All this is unsatisfactory. Unless we return to the recognition of the natural consequences of a grouping of individuals into a number of States which remain the creation of such individuals in general and to whom the States (as a conception) remain subservient, we shall never succeed in extricating ourselves from the difficulties which are the result of an artificial and unnatural division of world powers.

The present conception of a State is unjustified. As a State is not able to express its will except through individuals who wield a certain authority within the State or represent the majority of the individuals who compose it, this must necessarily lead to a majority rule or superior class rule without finding a proper check. The sovereignty idea prevents any effective remedy and creates endless obstruction. There is no inherent necessity for such abstract individuality. The division of humanity into groups is essential for organization purposes and in order that individuals may authoritatively express their will as a unity in the intercourse between the various groups or States which mankind has created.

The real function of the State is to act as a conduit pipe for the expression in international intercourse of the joint will of the nationals of whom it is composed. It is the duty of each State so to frame its national constitution that it is able to ascertain such joint will of its nationals and carry it out. It is in the interest of any international group system that the joint will of the nationals of any one group or State can be properly ascertained so that such international intercourse rests upon the component joint wills of the individuals who compose each group or State.

In that respect it is of international interest that each individual shall belong to a State and form part of its members and that such membership shall be inviolable. The individual is thus recognized as a member of the world community and who is for organization purposes labelled with nationality as belonging to a certain group or State among the groups or States into which mankind is divided. As a member of the world community the individual should be able to call for protection by the community. Through its organization such protection is delegated to the group or State of which the individual is a national. Such protection is a duty resting upon any State towards its nationals, the countervailing duty of the national being loyalty to the State to which he belongs. Under the law of nations the individual thus classified has a right to call for protection even against his own State if such duty is not properly observed or the national is oppressed by his own State.

⁵ "Towards a New English Democracy," *The Yale Review*, Yale University Press, Winter 1942, p. 237.

The order viewed in Oppenheim, *viz.*, that the State is the link whereby the individual obtains the enjoyment of the benefits under the law of nations is hereby reversed and should be reversed. From a unit or body clothed with absolute sovereignty, the State becomes a part of the world community and such community assumes sovereign rights under the law of nations, leaving to the State a restricted sovereignty for municipal purposes. The individuals being under the direct protection of the law of nations, receive such protection through the intermediary of the State to which they belong with a right of appeal should such protection fail to be given.

The benefits derived from such world order are: (1) equality of all individuals under the law of nations irrespective of the national group or State to which any one individual belongs; (2) protection of the individual against violation by a State of rights based upon such equality, *e.g.*, denationalization, class treatment, pogroms, etc.

By viewing the problem of a world order from this point most, if not all, difficulties vanish. The 1930 Conference at The Hague for the codification of international law could not find a solution of the difficulties attached to statelessness and double nationality for the simple reason that the various States adhered to their absolute sovereignty which gave them the right to decide who shall be their nationals.

By granting to the individual the basic human right of being a world citizen first and foremost, and by subjecting all sovereign States to a higher power consisting of the joint collectivity of the world States, a State is placed in its right position and an opportunity is created of framing a world constitution based upon international law.

It will require various other solutions, *viz.*, a form of a world community of States, the expression and formulating of its will, and the carrying out thereof. Those are problems not directly connected with nationality, which loses its problems as soon as State sovereignty is curtailed and the State is reduced to an instrument of government at the dictation of the individuals who form its nationals.

In view of the above we arrive at the following conclusion:

As soon as the State is no longer considered as a soulless superstructure or unit over and above the human group which forms its body, but as subservient to that body for its intercourse with other States in order by such form to express the will of the human group in the family of nations, the individual member of the State has an indirect and direct interest in any international organization. His indirect interest is that, through the medium of his nationality, that is to say, his membership of a State, he can normally enjoy benefits from the existence of the law of nations. His direct interest is that such relationship shall not be severed whereby he would be deprived of the possibility of the enjoyment of such benefits.

By sovereignty of the State is meant the sovereignty of the human group which forms the State and whereby it exercises as an independent body its

rights vis-à-vis other States. In that respect a State should recognize the same rights vested in its fellow States in the family of nations, one of the State's duties being not to burden other States with its own members.

It is the State's duty to maintain its nationals and to protect them inside and outside its territory. If the recognition of a State's sovereignty were considered to include the right to abandon its duty of protection of its nationals, the rights of the individuals would be no longer paramount and preference would be given to the machinery embodied in the formation of the State instead of to the individual, and the State sovereignty then becomes a means of oppression by one individual over another, although all nationals should receive equality of treatment within a State.

The formation of the State is based on the need of civilized men for an organization which will maintain and protect their civil rights and liberties.⁴ If the State fails to do so, the individuals should find protection elsewhere vis-à-vis their own State. If nationality is the link between an individual and the enjoyment of the benefits of the law of nations, the individual is entitled to invoke the protection of that law against the State which intends to sever such link. The individual cannot be left to the arbitrary power of the State to which he belongs.

Every State must look after its own nationals. Also in that respect another nation is entitled to invoke the law of nations in order to compel the nation to which an individual belongs to discharge its obligations in maintaining and protecting its own members. It is essential that the protection of the individual against oppression by its own State is recognized as an international right.

W. R. BISSCHOP

INTERNATIONAL VALIDITY OF NEVADA DIVORCES

The decision of the United States Supreme Court of December 21, 1942, has settled the validity of Nevada divorces inside the United States, with the exception of the question of the *bona fides* of domicile.

A word with regard to the international validity of divorces may be useful. There are, in this connection, two groups of States, one of which recognizes the jurisdiction of the court of domicile, regardless of the nationality of the parties, while the other group recognizes only their own courts' jurisdiction over matrimonial matters as it applies to their citizens. A national of Austria, Hungary or Czechoslovakia can, under his national law, be divorced only by the courts of his State, regardless of the fact that such a citizen may have been born in another country, and never—either before or after his marriage—have resided in the country of which he is a citizen.

For nationals of the first group of countries the situation is simple. A divorce granted by the courts of their domicile is valid everywhere, including

⁴ C. B. Fawcett in *The New Commonwealth Quarterly*, January, 1942, p. 204.

the country of which they are citizens. This ruling even applies to such States as, *e.g.*, Argentina, which in their legislation do not recognize the institution of divorce. Thus the Supreme Court of Buenos Aires recognizes a divorce granted to an Argentinian by the courts of his *bona fide* residence. It has, however, refused recognition of Mexican divorces in cases where the parties had merely legal, not actual, domicile in that country.

For nationals of the second group the situation is much more complicated. A divorce granted by the court of their domicile may be valid in the country of that court, and may be considered valid in other countries accepting jurisdiction of the court of residence, but still it would not be valid in their own country. This fact may have grave legal consequences with regard to the validity of a second marriage and to heritage rights, or those of children, of such a national. He must, in order to legalize his position, apply to his home courts. Such States provide for their citizens the special jurisdiction of one of their courts, as a rule that of the capital in cases where jurisdiction of none of their other national courts is provided, that is, in cases where the parties never have had domicile or even temporary residence in their homeland owing to the fact that, while their parents were nationals of that State, they themselves were born abroad and never resided in their country.

In normal times it was not altogether difficult for such citizens to apply to their national courts. Under present conditions, however, such procedure is practically impossible for nationals living in a country that belongs to the group of the United Nations, from which communication with their homeland is interrupted. Even regardless of this fact, many nationals of Austria, Hungary, Czechoslovakia, etc., could not hope to get an impartial hearing before their national courts.¹ It may also be argued that, as in the case of Austria or Czechoslovakia, for the time being no national courts exist. The courts functioning in the territory of those countries are not national courts, if considered courts at all from an international point of view.

This situation will be one of the many points to be considered in post-war legal reconstruction. Citizens of these countries now residing in the United States have been prevented from appealing to their national courts over a period of time. The retroactive recognition of a divorce which, under existing national laws, was not valid, may deeply concern the rights and privileges of third parties. Retroactive legislation, as a rule, is not accepted in international law. Thus this question remains one of the most difficult problems to be solved.

A procedure of which the defendant had no knowledge will not be considered valid from the point of view of international law. This, however, is different in cases where a defendant's residence cannot be ascertained and the appointment of a *curator absentis* is justified. Soviet divorce decisions which, under the former legislation, could be rendered without service on the defendant, and which, in some cases, remained unknown to him, were not

¹ *Banque de France v. N. Y. Supreme Court*, 287 N. Y. 283, 290.

considered valid by the European courts. The basic principle of due procedure and mutual hearing prevented the recognition of such decrees. The dissenting opinion of Justice Jackson to the decision of December 21, 1942, touches on this point as follows: "The spouse remaining within the state of domicile need never know of the proceeding." Such a decree, though valid in the United States, will not be recognized by the courts of any other country. We have, *e.g.*, the case of a well known actress whose Nevada divorce was to have legal consequences within Austrian territory, and whose husband, the defendant, had not been notified of the divorce proceedings. Without the courts having been obliged to pronounce their view on this subject, there could be no divergent opinion among Austrian lawyers.

Thus it can be said that a Nevada divorce, in which both parties were duly notified, is valid in all countries except in those that insist on their national courts' exclusive jurisdiction over their citizens.

E. DE HOFMANNSTHAL

NOTICE OF PROPOSED AMENDMENTS TO THE CONSTITUTION
OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The following amendments proposed by the Executive Council will be offered for adoption at the annual meeting of the Society to be held at Washington in the Statler Hotel on May 1, 1943:

Omit the second paragraph of Article III, and add the following as the fourth paragraph of that article:

"Additional Classes of Membership. The Executive Council may establish additional classes of membership upon such terms and with such dues as it shall determine."

Article VI, paragraph 1, third sentence, strike out the words "shall appoint from among its members," and substitute in lieu thereof the words "shall appoint from among the members of the Society."

GEORGE A. FINCH,
Secretary.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1942—FEBRUARY 15, 1943

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

September, 1942

- 3 AUSTRALIA—UNITED STATES. Effected agreement by exchange of notes at Washington, concerning the principles applying to the provision of aid in the prosecution of the war. Text: *Ex. Agr. Ser.* No. 271.
- 3 NEW ZEALAND—UNITED STATES. Effected agreement by exchange of notes at Washington concerning aid in the prosecution of the war. Text: *Ex. Agr. Ser.* No. 272.
- 9 TIN AGREEMENT. Belgium, Bolivia, Netherlands and the United Kingdom signed agreement at London for the control of the production and export of tin. Text: *G. B. T. S.* no. 9 (1942) *Cmd.* 6396.

October, 1942

- 22 BRAZIL—VENEZUELA. Signed convention for cultural interchange. *D. S. B.*, Dec. 19, 1942, pp. 1012–1013.
- 29 ARGENTINA—VENEZUELA. Signed reciprocal trade treaty at Buenos Aires. *D. S. B.*, Dec. 19, 1942, p. 1012. Text: *Argentine News* (Buenos Aires), Nov. 1942, pp. 9–10.

November, 1942

- 6–February 1, 1943. CUBA—UNITED STATES. Agreement by exchange of notes at Washington regarding application of the Selective Training and Service Act of 1940 as amended, to Cuban nationals in the United States and reciprocal treatment of American citizens in Cuba. Texts of notes: *D. S. B.*, Feb. 13, 1943, pp. 157–160.
- 11 CHINA—CUBA. Signed treaty of amity at Havana. *D. S. B.*, Nov. 28, 1942, p. 972; *N. Y. Times*, Nov. 13, 1942, p. 5.
- 11 PERU—VENEZUELA. Signed statement at Lima, concerning commercial relations. Text of statement: *D. S. B.*, Dec. 19, 1942, p. 1012. Signed same day a convention for the encouragement of historical studies. *D. S. B.*, Dec. 19, 1942, p. 1013.
- 16 GUATEMALA—UNITED STATES. Signed agreement at Guatemala relating to mutual aid in the prosecution of the war. Exchanged notes with respect to the application of certain provisions of the mutual aid agreement, etc. *D. S. B.*, Nov. 28, 1942, p. 972.
- 18 FRANCE (Vichy)—HONDURAS. Honduras severed diplomatic relations. *N. Y. Times*, Nov. 19, 1942, p. 4.
- 18 FRANCE (Vichy)—NICARAGUA. Nicaragua severed diplomatic relations. *N. Y. Times*, Nov. 19, 1942, p. 4.
- 18 GERMANY—POLAND. Governor General Frank issued a decree ordering expropriation of all Polish estates. *London Times*, Nov. 19, 1942, p. 3.

- 18-December 27. FRENCH NORTH AFRICA. The Sultan of Morocco pledged full coöperation to the United States Army on Nov. 18. *N. Y. Times*, Nov. 20, 1942, p. 5. On Nov. 25 the Sultan sent a message of friendship to the United States. Text: *N. Y. Times*, Nov. 26, 1942, p. 3; *D. S. B.*, Nov. 28, 1942, pp. 961-962. Admiral Darlan was assassinated Dec. 24. *N. Y. Times*, Dec. 25, 1942, p. 1. General Giraud was chosen High Commissioner on Dec. 27 to succeed Admiral Darlan. *C. S. Monitor*, Dec. 28, 1942, p. 1; *N. Y. Times*, Dec. 27, 1942, p. 1; *London Times* Dec. 28, 1942, p. 4.
- 19 BELGIUM (in exile)—CHINA. Announced that the Belgian Government in London had notified China of decision to abolish extraterritoriality. *N. Y. Times*, Nov. 20, 1942, p. 3.
- 19 MEXICO—SOVIET RUSSIA. Resumed diplomatic relations. *London Times*, Nov. 21, 1942, p. 3; *N. Y. Times*, Nov. 20, 1942, p. 1. Exchanged notes Nov. 10 and 12, Texts: *Russian Embassy Information Bulletin* (Washington) Nov. 21, 1942, No. 139.
- 21 MARTINIQUE. United States reached agreement with Admiral Robert, the French High Commissioner at Martinique, regarding French Caribbean possessions. *N. Y. Times*, Nov. 22, 1943, pp. 1, 37.
- 21 SYRIA & THE LEBANON—UNITED STATES. First United States Consul General presented his letters of credence. *B. I. N.*, Nov. 28, 1942, p. 1111.
- 22 NICARAGUA—UNITED STATES. President Samozá announced signature of a supplementary convention concerning the Inter-American highway. *N. Y. Times*, Nov. 23, 1942, p. 5. Text: *Ex. Agr. Ser.* No. 295.
- 23 UNITED STATES—URUGUAY. Effected agreement by exchange of notes for the purchase of Uruguayan wool by the United States. *D. S. B.*, Nov. 28, 1942, p. 972.
- 25 BRAZIL—UNITED STATES. Announced agreement under which export control will be decentralized. *N. Y. Times*, Nov. 26, 1942, p. 23; *D. S. B.*, Jan. 2, 1943, p. 9. See also article, *N. Y. Times*, Dec. 3, 1942, p. 40.
- 26 FRANCE (Vichy)—VENEZUELA. Venezuela recalled its diplomatic representatives from France. *N. Y. Times*, Nov. 28, 1942, p. 4.
- 26-27 COLOMBIA—FRANCE (Vichy). Colombian Foreign Minister announced Nov. 26 his country considered the French Government had ceased to exist as a sovereign independent entity. *N. Y. Times*, Nov. 27, 1942, p. 4. Diplomatic relations were severed by Colombia Nov. 27. *N. Y. Times*, Nov. 28, 1942, p. 5; *B. I. N.*, Dec. 12, 1942, p. 1146.
- 27 FRANCE (Vichy)—GERMANY. Following German occupation of Toulon, an undetermined part of the French fleet at Toulon was scuttled by the crews. In explanation of the occupation, Hitler sent a letter to Marshal Petain. Text: *N. Y. Times*, Nov. 28, 1942, p. 4; *London Times*, Nov. 28, 1942, p. 3.
- 28 CHILE—FRANCE (Vichy). Chile ordered chargé d'affaires at Vichy to proceed to Madrid. *N. Y. Times*, Nov. 29, 1942, p. 14.
- 30 FRANCE (Vichy)—NEW ZEALAND. New Zealand broke off diplomatic relations. *B. I. N.*, Dec. 12, 1942, p. 1149.
- 30 CANADA—UNITED STATES. Effected agreement by exchange of notes at Washington regarding postwar aims. Texts: *N. Y. Times*, Dec. 2, 1942, p. 13; *D. S. B.*, Dec. 5, 1942, pp. 977-979.

December, 1942

- 1-January 16, 1943 WAR DECLARATIONS. Ethiopia proclaimed a state of war with Italy, Germany and Japan on Dec. 1. *D. S. B.*, Dec. 19, 1942, p. 1009. Nanking Government in China declared war on the United States Jan. 9. *B. I. N.*,

- Jan. 23, 1943, p. 70. Iraq declared war on Jan. 16 on Axis Powers. *N. Y. Times*, Jan. 17, 1943, pp. 1, 4; *D. S. B.*, Jan. 16, 1943, pp. 42-43. Text of declaration: *London Times*, Jan. 18, 1943, p. 3.
- 2 PORTUGAL—UNITED STATES. Secretary of State Hull announced an "understanding" concerning commodity exchange, and its application also to shipping. *N. Y. Times*, Dec. 3, 1942, p. 20.
- 4 GREAT BRITAIN—UNITED STATES. Signed agreement and exchanged notes in London on certain problems of marine transportation and litigation. Texts: *D. S. B.*, Jan. 9, 1943, pp. 29-31; *Ex. Agr. Ser.* No. 282; this *JOURNAL*, Supp., p. 71.
- 6 NETHERLANDS (in exile). In a radio address Queen Wilhelmina suggested the post-war creation of a commonwealth, comprised of Holland, Netherlands East Indies, Curaçao and Surinam. *N. Y. Times*, Dec. 7, 1942, p. 11.
- 7 AXIS POWERS (3)—PARAGUAY. Paraguay announced suspension of direct and indirect transfer of funds of the Axis Powers. *N. Y. Times*, Dec. 8, 1942, p. 15.
- 9 NETHERLANDS (in exile)—SOVIET RUSSIA. Announcement made in London of agreement to exchange ambassadors. *London Times*, Dec. 10, 1942, p. 4; *B. I. N.*, Dec. 26, 1942, p. 1205.
- 9-17 JEWS. The Polish Government's note asked Allied Governments to protest German persecution of Jews. Excerpts: *London Times*, Dec. 11, 1942, p. 3; *N. Y. Times*, Dec. 11, 1942, p. 8. Summary: *B. I. N.*, Dec. 26, 1942, pp. 1207-1208. On Dec. 12 announcement was made by the United Nations of talks undertaken regarding persecutions. *N. Y. Times*, Dec. 13, 1942, p. 11. On Dec. 17 Secretary of State Hull announced joint pledge of the United States and 11 other governments of retribution for crimes against the Jews. Text of declaration: *N. Y. Times*, Dec. 18, 1942, pp. 1, 10; *London Times*, Dec. 18, 1942, p. 4.
- 10 ETHIOPIA—UNITED STATES. President Roosevelt announced extension of lend-lease aid to Ethiopia. *D. S. B.*, Dec. 12, 1942, p. 999; *N. Y. Times*, Dec. 11, 1942, p. 3; *B. I. N.*, Dec. 26, 1942, p. 1212.
- 10/16 PRISONERS OF WAR. British and Canadian Governments gave instructions to unshackle German prisoners on Dec. 12. *London Times*, Dec. 11, 1942, p. 4; *B. I. N.*, Dec. 26, 1942, p. 1197. Berlin broadcast of Dec. 16 stated Germany had handed a note to the Swiss Government regarding manacled British prisoners in Germany. *N. Y. Times*, Dec. 17, 1942, p. 13; *London Times*, Dec. 18, 1942, p. 4.
- 10-18 ALBANIA. Text of Secretary of State Hull's statement of Dec. 10 concerning Albania's restoration: *N. Y. Times*, Dec. 11, 1942, p. 4; *D. S. B.*, Dec. 12, 1942, p. 998. British Secretary for Foreign Affairs stated Dec. 17 that Great Britain will recognize an Albanian state after the war. Text of statement: *London Times*, Dec. 18, 1942, p. 3. Greek Minister of Information issued statement Dec. 18 that the Greek people would endorse Mr. Eden's statement. *London Times*, Dec. 19, 1942, p. 3; *B. I. N.*, Dec. 26, 1942, p. 1203. Foreign Commissar Molotov issued a statement that the Soviet Union fully sympathized with Albania's struggle for liberation. *B. I. N.*, Dec. 26, 1942, p. 1216.
- 11 ARGENTINA—UNITED STATES. According to a Presidential proclamation the trade agreement, signed at Buenos Aires on Oct. 14, 1941, will enter into force definitively on Jan. 8, 1943, following exchange of ratifications which took place Dec. 9, 1942, at Washington. *D. S. B.*, Dec. 12, 1942, pp. 1001-1002.
- 11 INDIA—UNITED STATES. President Roosevelt named William Phillips his personal representative with rank of Ambassador. *N. Y. Times*, Dec. 12, 1942, p. 8; *D. S. B.*, Dec. 12, 1942, pp. 998-999.

- 14 MADAGASCAR. British Foreign Secretary Eden and Gen. de Gaulle signed agreement in London for administration of Madagascar by the Fighting French. *B. I. N.*, Dec. 26, 1942, p. 1198; *N. Y. Times*, Dec. 15, 1942, p. 1. Text of joint communiqué: *ibid.*, p. 4; *London Times*, Dec. 15, 1942, p. 3.
- 16 DOMINICAN REPUBLIC—HAITI. Joint boundary commission reached an agreement at Ciudad Trujillo, after working intermittently for 13 years. *N. Y. Times*, Dec. 17, 1942, p. 9.
- 17 FINLAND—GERMANY. Announced signature of a trade agreement. *N. Y. Times*, Dec. 18, 1942, p. 3.
- 17 GERMANY—ITALY. Announced signature of a trade agreement. *N. Y. Times*, Dec. 18, 1942, p. 3; *B. I. N.*, Dec. 26, 1942, p. 1196.
- 17 GERMANY—SPAIN. Announced signature of a trade agreement. *N. Y. Times*, Dec. 18, 1942, p. 3.
- 19 GERMANY—SWEDEN. Signed commercial agreement at Stockholm. *N. Y. Times*, Dec. 20, 1942, p. 13.
- 19 MEXICO—UNITED STATES. President Roosevelt signed bill establishing commission to decide claims of American nationals against Mexico. *N. Y. Times*, Dec. 20, 1942, p. 33.
- 20 COLOMBIA. Congress voted to repeal the law requiring all foreign companies doing business in Colombia to have a Colombian national as a representative. *N. Y. Times*, Dec. 21, 1942, p. 2.
- 20 PORTUGAL—SPAIN. Spanish Foreign Minister announced creation of an Iberian bloc as an instrument of peace. *N. Y. Times*, Dec. 21, 1942, p. 7. Text of Portuguese official statement: *London Times*, Dec. 23, 1942, p. 3.
- 22 RUBBER AGREEMENT. Signed at Rio de Janeiro by Brazil and the United States. *N. Y. Times*, Dec. 23, 1942, p. 5.
- 23 MEXICO—UNITED STATES. Signed reciprocal trade agreement at Washington. *D. S. B.*, Dec. 26, 1942, p. 1029. Analysis, summary, tables: *D. S. B.*, Dec. 26, 1942, supplement. To come into force Jan. 30, 1943. *N. Y. Times*, Jan. 3, 1943, p. 38.
- 25 EASTERN PACT OF NON-AGGRESSION. The Saadabad Pact, signed July 8, 1937, by Turkey, Iran, Afghanistan and Iraq, was extended automatically for 5 years, since none of the signatories had denounced it 6 months before the expiry date. *B. I. N.*, Jan. 9, 1943, p. 36.
- 29 EXCHANGE FELLOWSHIPS. State Department announced suspension for the duration of exchange fellowships and travel grant awards to United States students. *D. S. B.*, Jan. 2, 1943, p. 8.
- 29 UNITED NATIONS DECLARATION—FRENCH SOMALILAND. French National Committee in London announced adherence of French Somaliland in East Africa. *N. Y. Times*, Dec. 30, 1942, p. 1; *B. I. N.*, Jan. 9, 1943, pp. 27-28.

January, 1943

- 1 BRAZIL—IRAN. Senhor Joaquin Silva was appointed first Minister to Iran. *B. I. N.*, Jan. 9, 1943, p. 24.
- 2 UNITED STATES FOREIGN POLICY. United States Department of State issued a book entitled Peace and War, concerning the foreign policy of the United States for the period 1931-1941. It is the introduction to a collection of documents to be published. Text: *N. Y. Times*, Jan. 6, 1943, pp. 1A-10A.

- 4 FRANCE (Vichy)—GERMANY. Paris radio, quoting the Official Gazette, announced an agreement had been reached for the release of French prisoners of war in Germany who are found medically unfit for military service. *N. Y. Times*, Jan. 5, 1943, p. 5.
- 4-20 PROPERTY IN OCCUPIED TERRITORY. United States and certain others of the United Nations and the French National Committee issued Jan. 4 a declaration on forced transfers of property owned by nationals of these countries now under enemy occupation. Text: *D. S. B.*, Jan. 9, 1943, pp. 21-22. The following announced adherence: Peru, Jan. 7; Paraguay, Jan. 9; Nicaragua, Jan. 19; Philippine Islands, Jan. 20. *N. Y. Times*, Jan. 8, 1943, p. 8; Jan. 10, p. 51; Jan. 20, p. 4; Jan. 21, p. 5.
- 8 CANADA—SOVIET RUSSIA. Prime Minister King announced appointment of L. D. Wilgress as first Canadian Minister to Russia, in accordance with the treaty signed June 12, 1942. *London Times*, Jan. 9, 1943, p. 3.
- 9 CHINA (Nanking)—UNITED STATES. Tokyo radio announced Nanking Government's declaration of war on the United States. *B. I. N.*, Jan. 23, 1943, p. 70.
- 9 CZECHOSLOVAKIAN RECOGNITION. Announcement made of Colombian, Ecuadorean and Venezuelan recognition of Czechoslovakian Government in exile. *N. Y. Times*, Jan. 10, 1943, p. 37.
- 11 ARGENTINA—GERMANY. Argentina declared the German naval and air attaché, Capt. Niebuhr, *persona non grata* and asked its chargé at Berlin to request his recall. *N. Y. Times*, Jan. 12, 1943, p. 5.
- 11 AUSTRIANS IN CANADA. Austrians in Canada to be no longer regarded as enemy aliens. *London Times*, Jan. 11, 1943, p. 4.
- 11 CHINA—GREAT BRITAIN. Exchanged notes dealing with navigation. *B. I. N.*, Jan. 23, 1943, p. 70.
- 11 CHINA—GREAT BRITAIN. Signed treaty at Chungking for the relinquishment of extraterritoriality in China. *D. S. B.*, Jan. 16, 1943, p. 60. Text, with exchange of notes, etc.: *China* No. 1 (1943) *Cmd.* 6417. Summary: *London Times*, Jan. 12, 1943, p. 4.
- 11 GERMANY—UNITED STATES. United States Department of State announced its protest against the expected removal to Germany, of interned American civilians now at Lourdes, France. *N. Y. Times*, Jan. 12, 1943, p. 1; *D. S. B.*, Jan. 16, 1943, p. 42.
- 11 ITALIANS IN CANADA. Italians in Canada are to be no longer considered enemy aliens. *London Times*, Jan. 11, 1943, p. 4.
- 11 LIBERIA—UNITED STATES. Liberia became eligible to receive lend-lease aid, upon President Roosevelt's finding the defense of Liberia vital to the defense of the United States. *D. S. B.*, Jan. 16, 1943, p. 59.
- 11-February 11 CHINA—UNITED STATES. Signed treaty at Washington Jan. 11 for the relinquishment of extraterritorial rights in China. Notes were also exchanged at Washington. Summary: *D. S. B.*, Jan. 16, 1943, pp. 59-61; *N. Y. Times*, Jan. 12, 1943, p. 4. Text with accompanying notes: *Executive A*, 78th Cong. 1st sess.; *Cong. Record* (daily), Feb. 1, 1943, pp. 485-487, this JOURNAL, Supp., p. 65. China ratified the treaty Feb. 4, according to announcement of Feb. 13. *N. Y. Times*, Feb. 14, 1943, p. 4. The Senate voted ratification Feb. 11. *Cong. Record* (daily), Feb. 11, 1943, p. 881; *N. Y. Times*, Feb. 12, 1943, p. 11.
- 12 FRENCH INDO-CHINA—JAPAN. Announcement of signature of an agreement for the export of rice and grain from Indo-China to Japan. *B. I. N.*, Jan. 23, 1943, p. 79.

- 14 CHINA—ITALY. Rome radio announced a note had been sent to China "formally renouncing all Italian concessions and extraterritorial rights in China." *N. Y. Times*, Jan. 15, 1943, p. 3.
- 14-27 CASABLANCA CONFERENCE. President Roosevelt and Prime Minister Churchill with their staffs, conferred at Casablanca, French Morocco, to map 1943 war strategy. *N. Y. Times*, Jan. 27, 1943, pp. 1-2. Text of communiqué issued at close of the meeting: *ibid.*, p. 1; *D. S. B.*, Jan. 30, 1943, pp. 93-94; *London Times*, Jan. 27, 1943, p. 4. On Jan. 27 United States Ambassador Standley handed to Premier Stalin a joint note from Churchill and Roosevelt. *N. Y. Times*, Jan. 28, 1943, p. 3.
- 16 AXIS POWERS (3)—IRAQ. War declared by Iraq, effective as of midnight Jan. 16-17. Text of declaration: *London Times*, Jan. 18, 1943, p. 3; *N. Y. Times*, Jan. 17, 1943, pp. 1, 4; *D. S. B.*, Jan. 16, 1943, pp. 42-43.
- 16 UNITED NATIONS DECLARATION—IRAQ. Iraq adhered to the Declaration. *N. Y. Times*, Jan. 23, 1943, p. 4; *D. S. B.*, Jan. 23, 1943, p. 83.
- 20 AXIS POWERS (3)—CHILE. Chile broke off diplomatic relations. *N. Y. Times*, Jan. 21, 1943, p. 8; *D. S. B.*, Jan. 23, 1943, p. 83.
- 21 CZECHOSLOVAKIA (in exile)—GREAT BRITAIN. Signed agreement on organization and use of Czechoslovak forces in the war, providing a lend-lease basis for articles and services supplied by British Government. *B. I. N.*, Feb. 6, 1943, p. 125.
- 22 AXIS SPIES. Emergency Advisory Committee for Political Defense of the Continent at Montevideo announced receipt of memorandum submitted by the United States concerning spies' activities in Argentina. *N. Y. Times*, Jan. 23, 1943, p. 5. Text of Ambassador Armour's note explaining United States position: *N. Y. Times*, Jan. 24, 1943, p. 11.
- 22 MEXICO—UNITED STATES. Reached agreement by exchange of notes at Mexico City, regarding military service by nationals of either country residing in the other. Summary: *N. Y. Times*, Jan. 23, 1943, p. 5. Text: *D. S. B.*, Jan. 23, 1943, pp. 87-90; this JOURNAL, Supp., p. 89.
- 27 POISON GAS. Chinese High Command charged Japanese Army with the use of poison gas on Jan. 6. *N. Y. Times*, Jan. 28, 1943, p. 1.
- 28 GOVERNMENTS IN EXILE CONFERENCE. Prime Ministers, Foreign Ministers of the exiled governments, representatives of the Fighting French National Committee, and British, American and Russian Ambassadors attended a meeting in London, at which future conduct of the war, postwar problems in Europe, federal blocs, etc., were discussed. *London Times*, Jan. 29, 1943, p. 3.
- 29 BRAZIL—UNITED STATES. President Vargas of Brazil announced accord on the war effort had been reached as a result of his conferences the previous day with President Roosevelt. Text of joint statement, memorandum for the press, etc.: *N. Y. Times*, Jan. 30, 1943, p. 3; *D. S. B.*, Jan. 30, 1943, p. 95.
- 30 BELGIUM (in exile)—UNITED STATES. Exchanged notes at Washington whereby Belgium agreed to provide essential materials to the United States under the lend-lease formula. *N. Y. Times* Jan. 31, 1943, p. 7. Texts: *D. S. B.*, Jan. 30, 1943, pp. 102-103.

February, 1943

- 1 CUBA—UNITED STATES. Signed supplementary military and naval pact at Havana. *N. Y. Times*, Feb. 2, 1943, p. 10.

- 2 GREAT BRITAIN—TURKEY. Announcement was made in London of recent conference between Mr. Churchill and Turkish and British war leaders. *N. Y. Times*, Feb. 2, 1943, p. 1. Text of British statement on the conference: p. 4.
- 6 UNITED NATIONS DECLARATION—BRAZIL. Brazil announced adherence to the Atlantic Charter and United Nations Declaration. *N. Y. Times*, Feb. 7, 1943, p. 27; Feb. 8, p. 3.
- 8 UNITED NATIONS DECLARATION—PERU. Peru adhered to the Declaration. *D. S. B.*, Feb. 13, 1943, p. 154.
- 12 JEWS IN RUMANIA. Announcement made in London that the Rumanian Government had informed United Nations officials that it is prepared to cooperate in transferring 70,000 Rumanian Jews from Trans-Dniestria to any refuge selected by the Allies. *N. Y. Times*, Feb. 13, 1943, p. 5.
- 13 PERU—UNITED STATES. Peruvian Cabinet announced approval of a treaty for the construction of airports and delivery of aircraft to hasten development of the rubber industry. *N. Y. Times*, Feb. 14, 1943, p. 29; Feb. 19, p. 2.

INTERNATIONAL CONVENTIONS

AIR MAIL AGREEMENT. Panama, Dec. 22, 1936.

Ratification deposited: Brazil. May 30, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

AIR TRAFFIC. Warsaw, Oct. 12, 1929.

Adhesion deposited: Liberia. *D. S. B.*, Dec. 12, 1942, p. 1001.

ASYLUM. Montevideo, Aug. 4, 1939.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Convention and Protocol. Geneva, June 7, 1930.

Ratification deposited: Brazil (with reservations). Aug. 26, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Conflict of Laws. Convention and Protocol. Geneva, June 7, 1930.

Ratification deposited: Brazil. Aug. 26, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

BILLS OF EXCHANGE AND PROMISSORY NOTES. Stamp Laws. Convention and Protocol. Geneva, June 7, 1930.

Ratification deposited: Brazil. Aug. 26, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

CHECKS. Convention and Protocol. Geneva, March 19, 1931.

Ratification deposited: Brazil (with reservations). Sept. 9, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

CHECKS. Conflict of Laws on Checks. Geneva, March 19, 1931.

Ratification deposited: Brazil. Sept. 9, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

CHECKS. Stamp Laws. Geneva, March 19, 1931.

Ratification deposited: Brazil. Sept. 9, 1942. *D. S. B.*, Jan. 30, 1943, p. 111.

CIVIL LAW. Montevideo, March 19, 1940.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

Text: *Congreso sudamericano de derecho internacional privado. Acta final.* 1940, pp. 73-88.

COMMERCIAL LAW. Montevideo, March 19, 1940.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

Text: *Congreso sudamericano de derecho internacional privado. Acta final.* 1940, pp. 61-72.

COMMERCIAL NAVIGATION. Montevideo, March 19, 1940.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

Text: *Congreso sudamericano de derecho internacional privado. Acta final.* 1940, pp. 31-40.

EDUCATION. San José, Sept. 5, 1942.

Signatures: Guatemala, El Salvador, Honduras, Nicaragua, Panama and Costa Rica.

Ratification: El Salvador. Nov. 6, 1942. *D. S. B.*, Jan. 9, 1943, p. 34.

Promulgation: El Salvador. Nov. 9, 1942. *D. S. B.*, Jan. 9, 1943, p. 34.

INTELLECTUAL PROPERTY (Copyright). Montevideo, Aug. 4, 1939.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

LIBERAL PROFESSIONS. Montevideo, Aug. 4, 1939.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

MONEY ORDERS. Buenos Aires, May 23, 1939.

Ratification: El Salvador. Dec. 16, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

MONEY ORDERS. Panama, Dec. 23, 1936.

Ratification deposited: Brazil. May 30, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

PAN AMERICAN INSTITUTE OF GEOGRAPHY AND HISTORY. Mexico City, Sept. 16-22, 1929.

Ratification deposited: Venezuela. Dec. 9, 1942. *D. S. B.*, Dec. 26, 1942, p. 1030.

PARCEL POST. Buenos Aires, May 23, 1939.

Ratification: El Salvador. Dec. 16, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

PARCEL POST AGREEMENT. Panama, Dec. 22, 1936.

Ratification deposited: Brazil. May 30, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

PENAL LAW. Montevideo, March 19, 1940.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

Text: *Congreso sudamericano de derecho internacional privado. Acta final.* 1940, pp. 49-60.

POSTAL UNION OF THE AMERICAS AND SPAIN. Panama, Dec. 22, 1936.

Ratification deposited: Brazil. May 30, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

PROCESSAL LAW. Montevideo, March 19, 1940.

Promulgation: Uruguay. Dec. 31, 1942. *D. S. B.*, Jan. 30, 1943, p. 112.

Text: *Congreso sudamericano de derecho internacional privado. Acta final.* 1940, pp. 41-48.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Ratification: El Salvador. Dec. 16, 1942. *D. S. B.*, Jan. 2, 1943, p. 10.

DOROTHY R. DART.

SUPREME COURT OF THE UNITED STATES

EX PARTE KUMEZO KAWATO

[November 9, 1942] *

The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

The Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Not only has the President not seen fit to use the authority possessed by him under the Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them.

Mr. Justice BLACK delivered the opinion of the court.

The petitioner, born in Japan, became a resident of the United States in 1905. April 15, 1941, he filed a libel in admiralty against the vessel *Rally* in the District Court for the Southern District of California. He claimed wages were due him for services as a seaman and fisherman on the *Rally*, and sought an allowance for maintenance and cure on allegations that he had sustained severe injuries while engaged in the performance of his duties. Claimants of the vessel appeared and filed an answer on grounds not here material, but later, on January 20, 1942, moved to abate the action on the ground that petitioner, by reason of the state of war then existing between Japan and the United States, had become an enemy alien and therefore had no "right to prosecute any action in any court of the United States during the pendency of said war." The District Judge granted the motion. Petitioner sought mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel the District Court to vacate its judgment and proceed to trial of his action, but his motion for leave to file was denied without opinion. We granted leave to file in this court, 316 U. S. 650, and the cause was submitted on answer, briefs and oral argument.

Although the court's order of abatement for the duration of the war rested solely on the ground of petitioner's status as an alien enemy, it has been argued here that the writ should be denied because the court could have dismissed the bill on other grounds, particularly claimed defects in the allegations of the libel. These contentions are irrelevant here. Unless the action was properly abated for the reasons set out in the motion and the court's order, the petitioner is entitled to have the District Court proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the court's order of abatement was erroneous mandamus is the appropriate remedy. 28 U. S. C. 342; *McClellan v. Carland*, 217 U. S. 268, 279-282; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546.

* 317 U. S. 69 (Preliminary print).

"Alien enemy" as applied to petitioner is at present but the legal definition of his status because he was born in Japan with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work and reimbursement on account of damages suffered while working for those citizens.

Petitioner contends that he has the right under the common law and treaties to proceed with his action, and that this right is not limited by the statutes. In our view the possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.¹

There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule was gradually relaxed as to friendly aliens² until finally in *Wells v. Williams*, 1 Ld. Raym. 282 (1698), the court put the necessities of trade ahead of whatever advantages had been imagined to exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien

¹ Petitioner argues that his case is covered by Article 23 h of the Annex to the IVth Hague Convention of 1907: "It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a court of law the rights and action of the nationals of the hostile party." This clause, which was added to the Convention of 1899 without substantial discussion either by the delegates in General Assembly or by the committee and subcommittee which dealt with it, III Proceedings of the Hague Convention of 1907, 12, 107, 136, 240; and I *ibid.* 83, was construed by an English court to apply solely in enemy areas occupied by a belligerent. *Porter v. Freudenberg*, [1915] 1 K. B. 857. The question has not been raised in the courts in this country, but the English interpretation was repeated with approval by Representative Montague of the Interstate Commerce Committee in his address to the House when he presented to it the Trading With the Enemy Act. 55 Cong. Rec. 4842 (1917).

² According to Littleton, an alien might not sue in either a real or personal action; but this rule was modified by Coke to bar such actions only by alien enemies and to permit personal actions by alien friends. See Coke on Littleton, 129 b. Pollock and Maitland suggest that this modification by Coke was "a bold treatment of a carefully worded text." 1 History of English Law, 2d ed., 459. The early law treated all aliens as a group. See the subtitles of Pollock and Maitland's chapter, "The Sorts and Conditions of Men," some of which are: The Knights, The Unfree, The Clergy, Aliens, The Jews, Women, etc. *Ibid.*, Chap. II. For a summary of English views now largely obsolete on alien standing in court see Hansard, Law Relating to Aliens, Chap. 7 (1844). For a survey of the common law on inheritance of land by aliens see *Techt v. Hughes*, 229 N. Y. 222 (Cardozo, J.).

enemies residing in England have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned as is petitioner here.³ *Schaffenius v. Goldberg*, [1916] 1 K. B. 284.

The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream. In the War of 1812, for example, many persons born in England fought on the American side.⁴ Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth. Hence in 1813 Chief Justice Kent, in *Clarke v. Morey*, 10 Johns. 69, 72, set the legal pattern which, with sporadic exceptions, has since been followed.⁵ The core of that decision he put in these words: "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity."⁶ Thus the courts aligned their policy with that enjoined upon the President by Congress in 1812 when it directed him to administer the laws controlling aliens in a manner that would be "consistent with the public safety, and according to the dictates of humanity and national hospitality." 50 U. S. C. § 22.

In asking that the rights of resident aliens be abrogated in their behalf, private litigants in effect seek to stand in the position of government. But only the government, and not the private individual, is vested with the power to protect all the people, including loyal aliens, from possible injury by disloyal aliens. If the public welfare demands that this alien shall not receive compensation for his work or payment for his injuries received in the

³ Petitioner was interned some months after the court had abated his action. The government has filed a supplemental brief stating that it does not consider that this circumstance alters the position of petitioner in respect to his privilege of access to the courts.

⁴ One writer estimates that half of the 400 men on board the *Constitution* when it captured the *Guerriere* were seamen who had deserted the British, and the ship *United States* was reported by its captain to have no men on board who had not served with British war ships. Bradley, *The United Empire Loyalists*, 192; and see 3 McMaster, *History of the United States*, 242.

⁵ For collection of cases see 30 Georgetown L. J. 421; 28 Virginia L. R. 429; 27 Yale L. J. 105; Huberich, *Trading With The Enemy*, 188 *et seq.*; *Daimler v. Continental Tyre Co.*, Anno. Cas. 1917 C, 170, 204; In the Matter of Bernheimer, C. C. A. 3rd,—F. 2d—; and for English cases, McNair, *Legal Effects of War*.

⁶ Story was one of the few commentators to approve any part of the early common law rule. He accepted so much of that doctrine as required enemy aliens entitled to relief in the courts to have entered the country under safe conduct or license. Story on Civil Pleadings, p. 10; Story's Equity Pleadings, Sec. 51-54, and particularly Sec. 724. This requirement was reduced to legal fiction in *Clarke v. Morey*, *supra*, at 72, when Chief Justice Kent held that "The license is implied by law and the usage of nations."

course of his employment, the government can make the decision without allowing a windfall to these claimants. Even if petitioner were a non-resident enemy alien, it might be more appropriate to release the amount of his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323, in which this court said that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

It is argued that the petitioner is barred from the courts by the Trading With the Enemy Act, 50 U. S. C. Appendix. The particular clause relied on is Sec. 7: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in Section 10 hereof [which relates to patents]; . . ." Analysis of its terms makes clear that this section was not meant to apply to petitioner, and an examination of its legislative history makes this doubly certain. Section 7 bars from the courts only an "enemy or ally of enemy." Section 2 of the Act defines the "alien enemy" to which the Act applies as those residing within the territory owned or occupied by the enemy; the enemy government or its officers,⁷ or citizens of an enemy nation, wherever residing, as the President by proclamation may include within the definition. Since the President has not under this Act⁸ made any declaration as to enemy aliens, the Act does not bar petitioner from maintaining his suit.

This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading With the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive,

⁷ Some possible confusion on the part of the court below and of other courts may have developed from our per curiam opinion in *Ex parte Colonna*, 314 U. S. 510 [this JOURNAL, Vol. 36 (1942), p. 489], in which leave to file a petition for writs of prohibition and mandamus in connection with a proceeding brought in behalf of the Italian Government was denied on the basis of the Trading With the Enemy Act. That opinion emphasized that an enemy government was included within the definition of the classification "enemy" as used in that Act, and that such enemy plaintiffs had no right to prosecute actions in our courts. The decision has no bearing on the rights of resident enemy aliens. The *Colonna* decision was momentarily misapplied in *Kaufman v. Eisenberg*, 177 N. Y. Misc. 939, but the trial judge corrected a stay in proceedings he had previously allowed upon his further consideration of the fact that the plaintiff was a resident alien.

⁸ The President has issued a proclamation taking certain steps with reference to alien enemies under the Alien Enemy Act of 1798 as amended, 50 U. S. C. § 21, but this proclamation has no bearing on the power of the President under the Trading With the Enemy Act.

was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable.⁹ This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried on."¹⁰ Thus Congress expressly recognized by the passage of the Act that "the more enlightened views of the present day as to treatment of enemies makes possible certain relaxations in the old law."¹¹

Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. Statements made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive.¹²

Not only has the President not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts,¹³ and this stand is emphasized by the government's appearance in behalf of petitioner in this case.¹⁴

⁹ Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., pages 15-22. *Coppell v. Hall*, 7 Wall. 542, 554, 557, 558.

¹⁰ Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 1.

¹¹ *Ibid.*, 2.

¹² "Mr. Montague: A German resident in the United States is not an enemy under the bill, unless he should be so declared subsequently by the proclamation of the President, in which case he would have no standing in court." . . .

"Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?

"Mr. Montague: If he is a resident of this country, he has the right under this bill without the proclamation of the President.

"Mr. Stafford: If so, where is that authority?

"Mr. Montague: In the very terms of the bill defining an enemy, whereby German residents in the United States have all rights in this respect of native-born citizens, unless these rights be recalled by the proclamation of the President for hostile conduct on the part of the Germans resident in the United States." 55 Cong. Rec. 4842, 4843 (1917).

¹³ "No native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is prevented by federal statute or regulation from suing in federal or state courts." Dept. of Justice press release, Jan. 31, 1942.

¹⁴ The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection. The government has an elaborate protective program. Under the Alien Enemy Act, 50 U. S. C. § 21, the President has ordered the internment of aliens, has instituted a system of identification, and has regulated travel. Under the First War Powers Act, 50 U. S. C. Supp. I, 1940 ed. Appendix, Sec. 5 (b), and various executive orders he has controlled the funds of resident enemy aliens. Many other statutes make a composite

The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens to enforce rights growing out of legal occupations. Let the writ issue.

ARBITRAL DECISION

IN THE MATTER OF THE SUSPENSION OF THE OPERATIONS OF THE FRENCH
COMPANY RADIO-ORIENT IN EGYPT¹

Rendered April 2, 1940

Except in cases in which the parties have agreed otherwise, every international arbitral tribunal is the judge of its own competence.

The sovereign rights of every State are limited by the obligations which it has assumed towards other States.

The Egyptian authorities had the right to inquire into and to find that Radio-Orient in allowing discounts violated Art. 33 of the Telegraph Rules annexed to the International Telecommunications Convention signed at Madrid Dec. 9, 1932; but in suspending the service of the company as a penalty for this violation without first informing the Government of the plaintiff in order that it might institute proceedings or answer the charge, the Egyptian Administration of Telegraphs violated its obligations under Art. 28 of the Convention.

Suspension of service of Radio-Orient terminated within six weeks, but its claim for damages dismissed.

Whereas, a dispute has arisen between the French High Commission to the States of the Levant under Mandate and the Egyptian Government relative to the action taken on April 16, 1935, by the Administration of Telegraphs of the Egyptian State forbidding its telegraph offices thereafter to accept telegrams for transmission from Egypt by Radio-Orient.

Whereas, this disagreement, putting in issue the services of the French Company Radio-Orient, which is a subsidiary of the French *Compagnie Générale de Télégraphie sans Fil*, having its headquarters at Paris and principal place of business at Beirut, could not be settled by diplomatic means.

Whereas, the parties, availing themselves of the provisions of Article 15 of the Telecommunications Convention signed at Madrid, December 9, 1932, have decided to submit this dispute to international arbitration.

Whereas, for this purpose the French High Commission to the States of the Levant under Mandate has chosen the Norwegian Government as arbitrator, and the Egyptian Government has chosen the Danish Government as arbitrator.

Whereas, these two Governments have jointly requested the Netherlands Government to be the umpire.

pattern which Congress has apparently thought adequate for the control of this problem. See, *e.g.*, the controls on alien ownership of land in the territories, 8 U. S. C. Chap. 5.

¹Translated by Eleanor H. Finch from a copy of the original French text furnished through the courtesy of Mr. Arnold Raestad.

Whereas, the three Governments have designated to compose the tribunal.

The Norwegian Government: Mr. A. C. RAESTAD, former Minister of Foreign Affairs, member of the Permanent Court of Arbitration;

The Danish Government: Mr. C. I. MONDRUP, Director General of Posts and Telegraphs of Denmark; and

The Netherlands Government: Mr. W. M. VAN LANSCHOT, member of the Upper Chamber of the States General, who, as umpire, has exercised the functions of President.

Whereas, the French High Commission to the States of the Levant under Mandate has appointed: Mr. J. PAUL-BONCOUR, member of the Bar of the Court of Appeal of Paris, as Agent;

And the Egyptian Government has appointed: His Excellency ABDEL HAMID BADAWI PACHA, President of the State Claims Commission, and Mr. MAURICE JACQUET, Royal Counselor, as Agents, and Mr. CHARLES AYOUB BEY, Assistant Royal Counsellor, as Counsel;

Whereas, upon request of the President of the Tribunal, the International Bureau of the Permanent Court of Arbitration placed its quarters and personnel at the disposition of the parties for the carrying out of the arbitral procedure thus initiated.

Whereas, the Tribunal therefore met at The Hague in the Palace of the Permanent Court of Arbitration on November 11, 1938.

Whereas, upon said date, the Tribunal, exercising the jurisdiction conferred upon it by Article 15, particularly paragraph 8, of the said convention, drew up rules for the regulation of its procedure.

Whereas, these rules fixed the time limits for the presentation of the case, the counter-case, the reply and the rebuttal.

Whereas, the time limit for the presentation of the rebuttal was extended by the Tribunal by agreement with the two parties.

Whereas, the parties have duly deposited these documents at the International Bureau of the Permanent Court of Arbitration.

Whereas, in their case and counter-case the Agents of the parties have presented to the Tribunal the following conclusions, namely,

The Agent of the French High Commission to the States of the Levant under Mandate:

To hold and declare that the seizure of documents by Egyptian officials, which is the basis of the disputed decision, should be held illegal and arbitrary, and consequently null and void, as a violation of the secrecy of correspondence, violation of domicile, abuse of powers, and violation of the procedure prescribed by the Capitulatory Régime then in force.

To hold and declare that the decision under attack is indisputably vitiated as a violation of Article 28 of the International Convention of Madrid, and as a violation of the rights of defense during a secret and *ex parte* inquiry.

To hold and declare, therefore, that the nullity of the procedure of inquiry must have the effect of the revocation, pure and simple, of the disputed decision.

Also:

To hold and declare that even if the errors pointed out do not nullify the contested penalty, it is the duty of the Egyptian Administration to produce the documents upon the examination of which it has based its decision.

Consequently, to order the production of these documents.

To state, upon examination of these documents, whether the violations set forth justify the most severe penalty in the list of sanctions in Article 33 of the Telegraph Rules.

To hold and declare that in any case the word "suspension" must be interpreted in conformity with its meaning in current juridical language, the most severe sanction consisting of a suspension for a limited time of service with private enterprises.

Consequently, to order the reopening of the line which has been closed since April 16, 1935.

Upon every hypothesis to deliver to the plaintiff States an official certificate of their right to claim and receive damages in case the documents produced by the Egyptian Government show, as everything seems to indicate, that the duration of the suspension is henceforth disproportionate to the gravity of the infractions set forth.

The Agent of the Egyptian Government:

To decide, laying aside all broader or contrary conclusions, that the penalty applied to the Radio-Orient Company by the Egyptian Administration is in conformity with the provisions of Article 33 of the Telegraph Rules annexed to the International Telecommunications Convention signed at Madrid December 9, 1932.

Whereas, the pleadings having been concluded, the Tribunal met at the Palace of the Permanent Court of Arbitration on February 7, 1940.

Whereas, after the Tribunal had heard the oral arguments of the parties and their additional explanations, as well as the explanations furnished by Mr. M. Gredsted, Chief of the Danish Telecommunications Enterprise, who was consulted as an expert, the President, on February 10, 1940, declared the arguments closed.

THE ARBITRAL TRIBUNAL

As to the facts:

Whereas, the French Company Radio-Orient, with a capital of 6,739,000 francs, is, within the meaning of the Telecommunications Convention and of the Telegraph Rules, a private enterprise recognized by the French High Commission to the States of the Levant under Mandate, which, under the

terms of a concession contract concluded on December 1, 1921, authorized it to operate wireless communications through a radiotelegraph station installed at Beirut.

Whereas, by virtue of Article III of this contract of concession, the Radio-Orient Company was to apply to the communications exchanged through its facilities the international rules in force, in conformity with Article 96, paragraph 3, of the Madrid Telegraph Rules, a provision binding upon the States of the Levant at the time the dispute arose, and which was retained without alteration in the Telegraph Rules of Cairo, 1938 (Article 105, paragraph 3),

Whereas the Radio-Orient Company had no telegraphic or radiotelegraphic stations in Egypt itself, and connection with the Egyptian services was made through telegraph lines which start in Egypt, cross Palestine, British mandated territory, and terminate at Beirut, where the telegraph services of the States of the Levant maintain direct contact with Radio-Orient.

The Radio-Orient Company has never maintained offices in Egypt open to the public for the transmission of telegrams, having no authority from the Egyptian Government to do so, which authorization is required by the Egyptian law of May 12, 1906.

However, in order to increase its revenue in Egypt the Radio-Orient Company made use of agents there who, under the provisions of Egyptian legislation, may exercise their profession without an authorization.

At the time that Radio-Orient began its activities in Egypt, no other wireless company was operating a similar service there.

After the 15th of January, 1928, the Marconi Radio Telegraph Company of Egypt began to operate a radiotelegraph service in Egypt directly connecting it with foreign countries, under an authorization given the company by the Egyptian Administration in 1926.

The Radio-Orient Company notified the International Telecommunications Bureau at Berne of the lines successively opened by it, as well as the rates established for transmission by each of these lines.

On January 16, 1923, the Egyptian Telegraphs Administration instructed its telegraph offices to accept telegrams via "Beirut-Radio" ("Radio-Syria"—line identification later changed to "Radio-Orient"), and, consequently, at no time until the prohibition in dispute did this Administration prevent its offices from accepting telegrams for transmission via "Radio-Orient."

Whereas, on April 14, 1935, the Under-Secretary of State in the Ministry of Communications of Egypt addressed the following letter to the Director of the Radio-Orient Company at Paris:

I am instructed to notify you that the Egyptian Administration has acted under Article 33 of the International Telegraph Rules and has given instructions to the Egyptian telegraph offices not to accept telegrams for transmittal over the lines of the Radio-Orient Company.

On the same day a letter of the same tenor was sent to the International Telecommunications Bureau at Berne, while a copy of this letter was sent the following day to Mr. Lucien Franc, agent of the Radio-Orient Company in Cairo.

Whereas, by Circular No. 162 (A) of April 16, 1935, the Inspector General of the Administration of Telegraphs and Telephones of the Egyptian State notified its offices that

Upon the receipt of these instructions no telegram shall be accepted for transmission via "Radio-Orient" or via "Radio-Syria." Every member of the public who sends telegrams marked for these routes must be informed that these routes are not used by Egypt. With the consent of the sender these telegrams must be sent by the most economical way. All care must be taken to avoid the least delay to the public. All requests for further information must be referred to the Head Office.

Whereas, on April 22, 1935, the Inspector General sent to the International Telecommunications Bureau in Berne a telegram worded as follows:

Reference letter Egyptian Administration 37-11/3 of April fourteenth please note that the information is given for registration at the Bureau. Notification to Administrations not requested now. Please acknowledge receipt.

Whereas, said Article 33 of the 1932 Telegraph Rules of Madrid is worded as follows:

The Governments of the Union reserve the right to apply penalties to private enterprises which directly or through their agents or sub-agents, allow to senders or receivers in any manner whatever discounts (per word, per telegram, under the form of rebates, etc.) having the effect of reducing the rates filed with the Bureau of the Union. These penalties may require the suspension of service with these enterprises.

This article was not modified at the time of the revision of the Telegraph Rules at Cairo in 1938.

Whereas, the plaintiff, while not denying that reductions have been allowed by the agents of the Radio-Orient Company in Egypt, maintains that the suspension at issue is vitiated by defects which render it null in law, and at any rate a limit should have been placed upon it a long time ago.

On the other hand, the defendant maintains that, even aside from Article 33 of the Telegraph Rules, the Egyptian Government by virtue of its sovereign rights can continue the suspension of service with Radio-Orient.

As to the competence of the Tribunal:

Whereas, the defendant asserts that the Tribunal is incompetent because of the fact that no arbitral agreement was made between the parties and, further, that the competence of the Tribunal extends only to the interpretation of Article 33 of the Telegraph Rules.

Whereas, Article 15, paragraph 1, of the International Telecommunications Convention signed at Madrid December 9, 1932, is thus worded:

In case of disagreement between two or several contracting Governments concerning the execution either of the present Convention or of the Rules envisaged in Article 2, if the difference is not settled through diplomatic channels, it is submitted to arbitration upon the demand of any one of the Governments in disagreement.

Whereas, except in cases in which the parties have agreed otherwise, every international arbitral tribunal is the judge of its own competence.

On the other hand, by Article 15 of the Convention of Madrid the competence of the Tribunal is limited to the dispute concerning the execution either of the Convention or of the Rules annexed thereto.

Whereas, the Convention of Madrid, since it does not provide for an arbitral agreement, bases arbitral jurisdiction upon the sole "demand of any one of the Governments in disagreement" and

The provisions of the above-mentioned article, with the statements formulated by the plaintiff, cover the principal subjects which normally are settled by the arbitral agreement.

Whereas, on the other hand, the plaintiff in a general way has submitted to the Tribunal the question whether the suspension of service with Radio-Orient can be continued in spite of the provisions of the Convention, particularly of Article 22, and of the Telegraph Rules, especially Article 47, whatever may be the legal basis upon which the Egyptian Administration of Telegraphs intended to rely.

THE TRIBUNAL declares itself competent to decide the dispute submitted to it by the plaintiff.

As to the question at issue:

Whereas, the Egyptian Administration of Telegraphs, at the time it informed Radio-Orient of its decision to forbid Egyptian telegraph offices to accept telegrams for transmittal via Radio-Orient, invoked Article 33 of the Telegraph Rules;

Whereas, the plaintiff, as aforesaid, asked the Tribunal to adjudge and declare that the nullity of the inquiry proceedings must have the effect of revoking, purely and simply, the disputed order.

Whereas, the answer to the question whether, by the suspension of service with Radio-Orient, the Egyptian Administration of Telegraphs did or did not violate its obligation to execute the Convention and Telegraph Rules, depends upon the nature of the action thus taken and not upon the nature of the proceedings leading up to it.

Whereas, for these reasons the Tribunal cannot declare that the suspension by the Egyptian Administration of Telegraphs should be revoked by reason of nullity.

Whereas, on the other hand, the plaintiff has complained that the Eryp-

tian Administration of Telegraphs violated its obligations under Article 28 of the Convention, which reads as follows:

The contracting Governments undertake to inform each other in regard to violations of the provisions of the present Convention and of the Rules agreed to, in order to facilitate prosecutions to be carried out.

Whereas, Article 9, paragraph 2, of the Convention, in conjunction with said Article 28, constitutes the principal provision in regard to penalties for violations of the Convention and Rules by private enterprises.

Whereas, if the prosecution of every violation of the Rules by a private enterprise constitutes an obligation on the part of the government which has licensed the company, that government likewise has the right to be put in a position to carry out such prosecution.

Whereas, on this point the plaintiff stated that it presented its complaint not only by way of diplomatic protection of the private enterprise Radio-Orient, but also in its own name, adding that the Administration of Telegraphs of the States of the Levant may as a result be forced to take over for its own benefit the radioelectric services of said company at Beirut.

Whereas, the Egyptian Government, when advised by its Administration of Telegraphs, should, in execution of Article 28 of the Convention, have informed without delay the Government of the States of the Levant of the violations of the Telegraph Rules imputed to Radio-Orient.

Whereas, a telegraph administration cannot apply to a foreign private enterprise the sanctions provided in the Telegraph Rules unless its Government, in accordance with Article 28 of the Convention, also informs the Government having jurisdiction of the company, thus enabling the latter Government either to institute proceedings or, in such case, to furnish proof that the charge made against the said enterprise is without foundation.

Whereas, under these circumstances there is no reason to examine whether the suspension of service with Radio-Orient does or does not constitute a too severe penalty in proportion to the infraction imputed to Radio-Orient.

Whereas, for these reasons, the Tribunal is of the opinion that the decision suspending the service with Radio-Orient cannot be maintained further on the basis of Article 33 of the Telegraph Rules.

Whereas, the defendant has, moreover, invoked Article 1 of the Convention concluded in 1919 between the Administration of Telegraphs O.E.T.A. (Oeust) (Occupied Enemy Territories Administration) and the Egyptian Administration of Telegraphs concerning the exchange of telegrams by lines between O.E.T.A. (Oeust), on the one hand, and Egypt and the countries beyond, on the other hand, by virtue of which article each of the parties can suspend telegraphic service in whole or in part, provided it notifies the other party.

Whereas, this convention is an agreement for the technical development of a means of telecommunication of the nature of those envisaged by Article

25 of the Convention and by Article 3 of the Telegraph Rules, and cannot in any way prejudice the full execution of the Telegraph Convention and Rules.

Whereas, the right to suspend international telecommunications services, reserved to Governments by Article 27 of the Convention, does not constitute a right accruing to the Egyptian Government in relation to Radio-Orient, but rather a right to act, in such a case, with respect to the Government of the States of the Levant.

Whereas, Egypt has invoked her sovereign right to maintain order in her own territory.

Whereas, it is true that only Egypt can police her own territory and, within the framework of the Convention of Madrid and of the Rules annexed, she is even obliged to do so in order to assure the carrying out of their provisions in her territory.

Whereas, the sovereign rights of every State are, however, limited by the obligations which it has assumed towards other States, in this case, by the Convention of Madrid and the Telegraph Rules.

Whereas, the situation is not changed by the fact that, according to the defendant, the Egyptian Administration of Telegraphs, in authorizing the Marconi Radio Telegraph Company of Egypt to operate radiotelegraph stations in Egypt, imposed upon the latter such conditions of service that in case of equalization of rates between the Marconi service and the Radio-Orient service, the Radio-Orient service is likely to entail financial sacrifices for Egypt.

Whereas, the plaintiff has reserved the right to claim damages.

Whereas, the Tribunal, in the face of admissions made in the course of the diplomatic correspondence, must recognize that the agents of Radio-Orient allowed discounts in violation of Article 33 of the Telegraph Rules, and, consequently, the Egyptian authorities had the right to make the ruling in dispute.

Whereas, under the circumstances the Tribunal, not being in possession of the facts necessary either to ascertain the date from which a time limit should have been placed upon the suspension of service with Radio-Orient, or to assess the damages suffered by the latter, cannot allow the plaintiff damages.

Whereas, for all these reasons the Tribunal is of the opinion that the suspension of service with Radio-Orient must terminate six weeks after the date of the present decision, that is, the order prohibiting Egyptian telegraph offices from accepting telegrams for transmission over the lines of the Radio-Orient Company must be revoked, to take effect at once, within the said period.

For These Reasons

THE ARBITRAL TRIBUNAL

1. Declares that the Egyptian Government, by failing to notify the French High Commission to the States of the Levant under Mandate concerning the

violations of the provisions of the Telegraph Rules of Madrid of 1932 committed by the agents of the Radio-Orient Company in Egypt, acted contrary to Article 28 of the International Telecommunications Convention of Madrid, 1932.

2. Orders the revocation, within six weeks after the date of the present decision, of the order by which the Egyptian Administration of Telegraphs on April 16, 1935, prohibited Egyptian telegraph offices from accepting telegrams for transmission over the lines of the Radio-Orient Company.

3. Dismisses the other contentions of the plaintiff.

Done at The Hague in the Palace of the Permanent Court of Arbitration, April 2, 1940.

BOOK REVIEWS AND NOTES

Digest of International Law. By Green H. Hackworth. Vol. IV, Chapters XII-XV. Washington: Government Printing Office, 1942. pp. vi, 949. \$2.50.

Somewhat larger than any of the preceding volumes of the *Digest*, this latest offering from the Legal Adviser of the Department of State continues in like fashion to be a documentary portrayal of the views of his Government. It is a precious contribution that must evoke the gratitude of all who need the materials that are published. Chapter XII is concerned with Extradition, Chapter XIII with International Communications, Chapter XIV with Intercourse of States, and Chapter XV with Consuls.

To the matter of Extradition 241 pages are devoted. In relation to the construction of relevant treaties, attention is called to statements of the Supreme Court of the United States that treaties should be "liberally construed" (pp. 38-39). It may be observed, however, that in every case where that tribunal has so expressed itself, the utterance was really a dictum, and not essential to the conclusion reached. In the brief treatment of "Act Charged a Crime in Both Countries" (§ 315), there is of course a quotation from the important case of *Factor v. Laubenheimer* (290 U. S. 276, 298), unaccompanied, however, by discussion of the theory of the decision. Secretary Hull's interesting note of declination to surrender Sarro Vaccaro to Canada in 1934, who was wanted by that country for kidnapping, is set out (p. 162). Documents revealing the discussion in 1932-33 with the Greek Government in the case of Samuel Insull, and concerning the application of the American-Hellenic Treaty of Extradition of May 6, 1931, are withheld for the later volume that will deal with treaties. Materials on Procedure (§§ 332-337) are abundant.

The Chapter on Communications is concerned with Electrical Communications, such as Submarine Cables (§§ 349-352), Radio (§ 353), Regulation of Use (§§ 354-358), Postal Communications (§§ 359-361), Maritime Navigation (§ 362), Inland Transportation (§ 363), Freedom of Transit (§ 364), and Aviation (§§ 365-369).

Some 261 pages refer to Intercourse of States. Here the documents concern Diplomatic Missions (§§ 370-380), the Beginning and End of Mission (§§ 381-387), Rights and Duties of Diplomatic Representatives (§§ 388-399), Diplomatic Immunities, embracing exemption from Judicial Process (§§ 400-405) and Taxation (§§ 406-411), as well as Official Communication (§§ 413-418), Ceremonial (§§ 419-420), Executive Control of Foreign Relations (§ 421), and Use of Official Documents (§ 422). It will be noted that, with respect to exemptions from taxation, the Government of the United States appears to offer a basis of reciprocal concessions that probably goes beyond what international law as such demands of the individual State.

In examining generally the materials offered, one becomes aware of the paucity of data indicative of precepts of international law respecting the functions of diplomatic officers as such, and of the need of turning for light to the domestic regulations of individual States.

The materials respecting Consuls cover 294 pages. They have reference to Appointment and Classification (§ 423), Recognition (§§ 424-427), Privileges and Immunities (§§ 428-433), Amenability to Local Jurisdiction (§§ 433-438), Powers and Duties (§§ 439-444), Duties with Respect to Seamen (§§ 445-459), and Fees (§ 460). Here, as is also the case with respect to Diplomatic Intercourse, attention is called to the numerous Foreign Service Regulations and Laws of the United States, as indicative of what may be claimed in behalf of American officers. Today, consular privileges are, in the case of the United States, largely regulated by treaty, and notably by conventions following that concluded with Germany of December 8, 1923. Mr. Hackworth adverts to the fact that in the invocation of it (and of kindred arrangements) by other countries under the most-favored-nation clause, the clause is interpreted conditionally in the sense that reciprocal concessions must always be shown to be yielded by the invoking State. (See, for example, instances, pp. 784-785; also statement of Mr. Hackworth, p. 796.)

To those engaged in the intriguing fact-finding endeavor to ascertain how the United States conducts its foreign relations, and what it deems to be the law of nations as perhaps modified by its conventional experiences, volumes such as this fourth number of Mr. Hackworth's *Digest* give zest to the task and sustain the hope that it is not beyond the range of accomplishment.

CHARLES CHENEY HYDE

Die Gutachten des Ständigen Internationalen Gerichtshofes als Mittel zwischenstaatlicher Streitschlichtung. By Dr. Hans Kaufmann. Basel: Helbing & Lichtenbahn, 1939. pp. 239. Bibliography.

No subject relating to the Permanent Court of International Justice has been so widely discussed in the United States as its power of rendering advisory opinions. Unfortunately, what should have been a clear stream of scientific discussion was badly muddled by the bitter partisan strife prevailing in Congress when our adherence to the court was under consideration. The present work by a Swiss jurist dealing objectively with this function of the court will be welcomed by students of judicial organization. The author analyzes the Statute of the court as amended by the Protocol of September 14, 1929. The text of Article 14 of the Covenant, which is incorporated by reference in the Statute, has given rise to much misunderstanding because it permits the court to give an advisory opinion upon any "dispute or question" referred to it by the Council or by the Assembly. The author makes frequent reference to the "*différend-point*" problem as he calls it. Some believe that no real distinction was intended. The author inclines to this view by referring to the fact that it was first proposed to use the

word "issues" in the original English text. However, the argument over the final text has left its mark, and the Regulations now provide for a procedure different for the consideration of a "dispute" from that required for a "question".

The author deals with the power of the court to determine whether or not it will comply with a request for an advisory opinion. He also discusses the position before the court of States directly or indirectly interested in the question or dispute, as the case may be. The position of non-members of the League is considered. The author does not find the action of the court in the Eastern Carelia case to be consistent with the action taken in the Mosul Boundary case. The essentially judicial nature of the procedure in advisory cases is emphasized, but the author rightly points out that this does not give to advisory opinions the binding authority of a judgment. He believes that this is not a fault but a virtue because it helps to clear up controversies between States without resort to obligatory procedure or binding decisions upon the merits where no general claim has yet been asserted. He recognizes the value of advisory opinions as an aid to the functioning of the League. However, he does not share the opinion of Hudson (expressed in 1934) that the court's chief contribution to the maintenance of peace has been the assistance given to the Council through the rendering of advisory opinions. In this respect, the author inclines to take the view of de Bustamante that the Council should not thus be able to shift its responsibilities to the court. On the other hand, he believes that a method should be devised to permit requests for advisory opinions by non-members as well as by members of the League without the intervention of the Council. As the title of the book implies, the author views the advisory opinion as an independent means for the settlement of international disputes.

ARTHUR K. KUHN

Repertoire of Questions of General International Law before the League of Nations, 1920-1940. Prepared by Walter Schiffer. Geneva: Geneva Research Centre, 1942. pp. 390. Indices. \$3.50; Sw. Fr. 15; 15s.

In the transactions of the Council and the Assembly of the League of Nations problems of international law have been discussed more intensively than anywhere else. Delegates and legal experts have expressed opinions on many important questions; but it has not been easy to find within the official documents of the League this valuable material scattered throughout the numerous volumes of its *Official Journal*. It was, therefore, an excellent idea to compile all the passages which deal with questions of international law and present them in a clear system. This is the purpose of the present volume. It is a repertoire of questions of *general* international law. *Particular* international law, conventions or draft treaty stipulations have been taken into consideration only when they dealt with fundamental institutions or the evolution of international law. The law of the League of Nations,

namely, the Covenant, and its interpretation, are excluded as particular international law. The reason for this limitation is, as the author of the compilation says in his introduction, "that the Covenant and its clauses have already been dealt with in a number of general and special studies giving more or less complete references to their interpretation in the practice of the League of Nations."

All references or groups of references referring to a special legal problem are preceded by a short summary of the contents of the texts referred to. This summary is given either in the form of a general title or of a sentence. An interrogative sentence indicates that contradictory opinions were expressed. Although all the original documents to which reference is made are available both in French and in English, the work has been compiled in French. Titles and subtitles, the table of contents and the alphabetical index are, however, given in English also.

The whole material is divided into six parts: general questions, persons in international law, objects of international law, legal relations between States, international disputes, war and neutrality. The volume is the result of several years of research. Only a scholar who, as Mr. Schiffer does, unites perfect mastery of the material concerned with profound knowledge of international law was able to perform such a work. It is a book of reference which certainly will become indispensable to any person or institution working in the field of international law.

HANS KELSEN

A Guide to American International Law and Practice. By John H. Wigmore. Albany and New York: Matthew Bender & Co., 1943. pp. xxxii, 493. Appendixes. Tables. Index. \$6.50.

This volume by the eminent authority on the law of Evidence will be welcomed by the American Bar and I dare say by the Bars of many other countries. In a foreword by Frederic R. Coudert, President of the American Society of International Law, he states: "It is thus most fitting that an outstanding jurist and publicist, whose name is a household word among the lawyers of America, should reduce to brief formulation this great body of law, stated in lucid fashion and supported by the apposite references to authority. I am happy to commend this admirable work to every lawyer in our land who wishes to equip himself adequately to advise regarding the many legal problems which may confront him in a general law practice." The approach to the subject is novel among textbooks on international law. The expressed purpose of the Guide is to help persuade the practitioner that international law is an American subject and is useful in the ordinary practice at the Bar. It is, therefore, the "aim to concentrate on American (i.e., United States) International Law." "The present Guide is offered to aid the willing practitioner to educate himself for advising his client."

Carrying out this purpose, the subject is divided into four parts: Substantive Law, Law of War, International Legislation, International Ad-

judication. These are subdivided into topics under which the matter is presented in the form of searching questions with references to accessible American materials, such as statutes, decided cases, treaties, texts, diplomatic correspondence, etc., in which the answer may be found. This method is used in about one-half of the text. Some of the topics are elucidated by brief comments or explanations. In the section on international legislation, comments by the author and extracts from treaties, texts and addresses increase in number. The North Carolina Declaration of 1941, and Governor Stassen's Plan of 1942 on World Federation, are included. This section shows that it is impossible to stick to purely American materials in a treatment of international legislation. Some treaties and acts to which the United States is not a party are properly cited. In the section on arbitration the question form is largely supplanted by comments and extracts. In this section nine arbitrations before international commissions are summarized as well as six cases before the Hague Tribunal and two cases before the World Court. In all of these, except the last two, the United States was a litigant. The United States has never been a party to or a litigant before the World Court. The United States-German claims arbitration of 1922, involving the largest group of claims in number and amount ever arbitrated by the United States, is not reviewed. This section will make clear to the American practitioner that in cases before arbitral tribunals he will not be wise to rely entirely on American materials, but will have to examine foreign sources just as thoroughly.

L. H. WOOLSEY

Anuario de 1942 de la Sociedad Cubana de Derecho Internacional. Habana: Editorial Luis Ruiz, 1942. pp. 372.

Under the conditions existing today the considered opinions of those trained in the law as it formerly existed between States has a more than ordinary significance. Every program looking towards an ordered world is based upon the foundations of international law. For this, if for no other reason, the thought of the jurists and publicists in the field of international law should merit the careful attention of all who look towards a world based upon law rather than force.

The Proceedings of the 1942 meeting of the Cuban Society of International Law present a number of papers which are important contributions to the study of international organization. Of the addresses in this field, one of the most timely and interesting is devoted to the subject "The League of Nations in the Post War World." In this address Dr. Enrique Guiral Moreno maintains that after this war we shall have to accept the same principles as laid down by Woodrow Wilson at the end of the last war. But he agrees also with Sumner Welles that the League of Nations must be strong enough to guarantee both disarmament and equality of economic opportunity. In other words, President Wilson's League lacked the force which is absolutely essential in a world where good faith alone is not enough.

The scholarly and persuasive paper presented by Dr. Gustavo Gutiérrez more specifically argues that the Magna Charta of the New World Order is the Covenant of the League of Nations rather than the Atlantic Charter. However, he would revise the League in many ways, beginning with its name, which he feels should be Society of Nations or Commonwealth of Nations. He argues cogently that one of the reasons for the League's failure was its lack of universality with the United States out, with Germany admitted late, and with Russia inspiring the fear of communism. Other weaknesses which he would remedy were the rule of unanimity, the failure to give the World Court obligatory jurisdiction over all legal disputes, and finally the lack of an effective executive power in the League to solve international disputes by peaceful means. With these improvements made, he would add as an essential part of the structure, a Declaration on the Rights and Duties of States, and also a Declaration on the International Rights and Duties of Individuals. The first declaration he bases largely upon the principles already accepted by the twenty-one American Republics in the recent Pan American Conferences; the latter upon a suggestion first proposed by Alvarez in 1917, supported and enlarged by Lapradelle in 1921, debated and approved at Briarcliff Manor in 1929, and in full fruition in the Roosevelt message to Congress in 1942 demanding the four freedoms for the individual. His paper is a remarkably logical and convincing program for a successful world organization.

Several excellent papers on various phases of Pan American relations were presented, of which two were by feminine members: Señora Mercedes García Tadorí and Señorita Iluminada Acosta García. Private international law also received some attention at the conference. Space prevents consideration of the various addresses at the opening session other than to mention the characteristically appropriate opening address of Dr. Antonio S. Bustamante, President of the Society, and the well presented historical exposé by Dr. Herminio Rodríguez, Secretary of the Society.

GRAHAM STUART

The Policy of the United States toward the Neutrals, 1917-1918. By Thomas A. Bailey. Baltimore: The Johns Hopkins Press, 1942. pp. xviii, 520. Index. \$3.50.

For almost a quarter of a century a myth has been perpetuated in textbooks and, "with cynical embroidery, in countless classrooms," that the United States—the great champion of neutral rights from 1914 to 1917—immediately reversed itself when it entered the World War and (in the words of Burton J. Hendrick) became as great a "criminal" as Britain in violating the rights of neutrals. Professor Thomas A. Bailey, in a study which is a model of scholarly care and investigation, has demonstrated the falsity of the charge. The record shows that the United States Government was pains-

takingly solicitous of the rights of the weak neutral States even after our entry into the war. As a belligerent, we declined to engage in the British blockade methods which we had condemned as illegal while we were neutral; we persistently declined to follow the British practice of seizing neutral vessels on the high seas for search in port, or even the policy of mandatory routing of neutral vessels to Allied ports for detention and search; we forbade our naval officers to remove enemy nationals from neutral vessels on the high seas; and, since we took no prizes during the World War but concentrated on anti-submarine operations, convoys, and containing the German Navy, we had no occasion to adopt British prize court procedures which we had previously characterized as illegal.

On the other hand, as a belligerent, we engaged in certain practices against which we had protested while neutral (the blacklist, bunker control, postal and cable censorship, and, on one occasion, hovering), but these practices were undoubtedly legal, however harsh their effects may have been on neutrals. On certain other matters of doubtful legality on which, while not formally protesting, we had reserved our rights as a neutral, we reversed ourselves and engaged in extending the contraband lists and planting mines on the high seas. On one other matter, not connected with maritime law, the United States was long guilty of a violation of international law. This was the drafting of neutral alien declarants under the Selective Service Act. The State Department, which had apparently never been consulted in advance, made valiant efforts to correct the situation, but the War Department could not be bothered, and it was over a year before Congress corrected the law. There were one or two other violations of neutral rights of a minor nature, but, writes Professor Bailey, "the conclusion is inescapable that the Washington government did not violate international law in a sweeping and ruthless fashion, and that its record on the whole is creditable."

Before reaching this conclusion, Professor Bailey examined in detail the embargo, the negotiation and operation of the rationing and tonnage agreements with the European neutrals, our relations with Latin American neutrals, our bunker and blacklist policies, and (particularly interesting to international lawyers) our activities relative to maritime law and neutral rights. The author had full access to the manuscript archives of the Department of State, the War Trade Board, and similar Government agencies, as well as to the Wilson, Lansing, House and Hoover papers. One of the most interesting features of the book consists in the corroborative comments obtained by the author during 1941 and 1942 from men like Lester H. Woolsey, Frank L. Polk, Alonzo E. Taylor, Vance McCormick, Charles Warren, and other participants in the formulation and execution of policy in 1917 and 1918. The skill, impartiality, and thoroughness with which Professor Bailey has marshalled and weighed all the evidence would seem to preclude any further debate on the question.

HERBERT W. BRIGGS

How To Win the Peace. By C. J. Hambro. Philadelphia, New York: J. C. Lippincott Co., 1942. pp. 384. Index. \$3.00.

The author brings his long experience with the working of the League of Nations and parliamentary institutions in Norway to bear upon post-war problems. He believes there should be a long armistice period during which the United Nations will be in military occupation of enemy territories, meeting emergency problems, and conducting discussions in regard to long-run problems. He believes that the final peace should be merely a coördination of the agreements on policy reached during this period. He opposes reparations but favors restoration of stolen goods and punishment of persons guilty of war crimes. Boundary changes, he thinks, should be kept at a minimum, but Danubian countries might well be economically united and colonial areas might be placed under international control. He is insistent that a universal world organization is necessary, supported by adequate power and with procedures for compulsory adjudication and peaceful change.

Hambro devotes most of his book to political problems because he considers them most pressing and most directly related to the causes and prevention of war. Furthermore, economic problems, in his judgment, cannot be solved until the political structure is known. Economic problems can only be solved gradually and, if a suitable political organization is established, progress in regard to them may be anticipated. Hambro believes in free enterprise without denying the need of social legislation. He fears, however, that governmentalization of economy is more likely to lead to war than to peace. The author has read voluminously in the current literature of post-war problems and his intimate knowledge of international institutions and of European conditions and history makes it possible for him to disclose errors which have crept into writers less informed on these questions (pp. 169, 371). This precision of knowledge gives an authoritative quality to his judgment lacking in many current studies of the subject. He combines constructive idealism with a keen understanding of the need to deal with concrete problems and to preserve historical continuity (p. 199). He emphasizes the importance of the policy of the United States in the post-war settlement, and also the difficulty of knowing that policy in advance because of the possibility of minority control of foreign policy under the United States Constitution (p. 262). He perhaps underestimates the advances which have been made toward reducing the influence of the two-thirds rule in the Senate vote on treaties during the past decade.

A few inaccuracies and inconsistencies were noted by this reviewer. The author was probably thinking of the offer of a mandate for Armenia to the United States when he said "The United States had been given a mandate over the former German islands in the Pacific" (p. 171). The statement that the only economic provision in the Versailles Treaty was the "decision that Germany should make reparations" (p. 172) certainly is inaccurate

and is inconsistent with the author's own emphasis upon the economic clauses in Article 23 of the Covenant (p. 358). The author seems to put the cart before the horse in saying "until nations demand that the same principles of moral responsibility shall govern international life as are enforced in national life, no new world order will prove successful" (p. 271), and also in criticizing the reluctance of Britain to "make defined engagements for undefined circumstances" (p. 366). The general argument of the book seems to be that such practices are forced on States under a balance of power system and cannot be done away with until the world order is provided with sanctions so as to give real security.

Hambro believes from his examination of the Ethiopian case that "sanctions such as that suggested here can be wholly effective only if it is known that they will be supported if that should be necessary by the ultimate sanction which is blockade" (pp. 343-44). The implication here and elsewhere is that sanctions of the type envisaged by the Covenant are adequate. To the reviewer the discussion rather suggests that nations cannot be relied upon to carry out sanctioning obligations in good faith in all circumstances and therefore sanctions cannot give genuine security unless there is an embodied international police force. Hambro toys with this idea but he shies off from positively endorsing such a force (pp. 247, 333).

The discussion of the rôle of small nations (p. 149), of the dangers of too much self-determination (pp. 174, 178), of the historical, psychological and philosophical roots of the behavior of the Axis Powers (p. 62 ff), of the dangers of the unanimity rule in international organization (p. 224 ff), and of the economic factors in international conflict (p. 356 ff) are particularly good. The author has a hard-hitting and pungent style, especially effective in dealing with the errors and crimes of statesmen of the past twenty years, of which he gives many concrete examples. The book is interesting and provocative reading and should have a wide audience. Throughout the author recognizes that international law must be the basis of an adequate world order but that that law needs development.

QUINCY WRIGHT

Inter-American Affairs, 1941—An Annual Survey, No. 1. Edited by Arthur P. Whitaker. New York: Columbia University Press, 1942. pp. xi, 240.

The momentous events that have taken place in the Western hemisphere during the last decade have, as never before, awakened public opinion in the United States to the vital importance of Inter-American solidarity and coöperation. In the tremendous conflagration which threatens the freedom of the whole of mankind, a free America can survive only as a united America. Public interest in intra-continental problems has consequently increased day by day, along with the necessity for accurate and competent information on the many questions comprised within the broad field of Pan Americanism. This interest and this need are emphasized by the appearance of this volume, edited by the distinguished Professor of the University of

Pennsylvania, Dr. Arthur P. Whitaker. It purports to be the first of a series of annual surveys covering all important developments in Inter-American relationships and it contains, as such, a thorough and methodical discussion of all the aspects of continental affairs during the year 1941.

The first chapter, a fitting introduction to the work, is, as suggested by its title, a history of "Half-a-Century of Inter-American Relations," from 1889 to 1940. This and the second chapter, devoted to the subject of "Politics and Diplomacy" in the continent, as well as a closing "Summary and Prospect," are by Professor Whitaker. The other chapters are: "Economics and Finance," by George Wythe; "Cultural Relations," by William Rex Crawford; "Public Health, Social Welfare and Labor," by William L. Schurz. The book contains as Appendices a table of Inter-American and World Trade, another showing United States Investments in Canada and Latin-America, and a third one giving the Area, Population, Chief Executives and Ministers of Foreign Affairs of each one of the American Republics. The value of the volume as a reference work is further enhanced by an excellent Chronology compiled by Raymond J. Dixon, and an alphabetical index. The topics of the different chapters are treated by the respective authors in a clear, readable, scholarly manner. Here is a welcome addition to Inter-American literature and a "must" volume in the library of every student of the international life of the new world.

RICARDO J. ALFARO

Permanent Revolution. By Sigmund Neumann. New York: Harper & Bros., 1942. pp. xviii, 388. Bibliography. Index. \$3.00.

The present volume embodies essentially a description, analysis, and interpretation of totalitarian dictatorship. The picture is drawn according to the personal views of the author, in the main, in spite of the elaborate (60 pp.) bibliography; not much attempt is made to support the interpretations given by reference to the opinions of other students (there are no footnotes), nor to take note of any possible conflicting opinions. The work, in short, is a three hundred page flow of the soul of its author salted with a not inconsiderable amount of data but still a flow of personal ideas and feeling.

In substance the treatment covers the nature of modern dictatorship—top, middle stratum, bottom basis—party organization in the totalitarian state, the position of the masses, control of the masses, and the position of the totalitarian state in war and international relations. It would be impossible to sum up here the conclusions drawn on all of these points; it does not appear, moreover, that the views of the author differ greatly from the orthodox teachings of exponents of "democracy" in general, although the presentation is the clearest and most cogent which this reviewer has encountered.

It is just here that the reviewer would, however, beg leave to raise certain questions, pertinent or impertinent. Why do students of the phenomena

under discussion not explain that proletarian or semi-proletarian dictatorship is simply the fruition, not the denial, of modern democracy? Why do they not show how the dictator and the party are created or called forth by the masses, instead of concentrating attention upon the dictator and his aids and picturing their activities as though they derived from thin air or solely from the personal desires of the "leaders"? Why do they not at least try to offer some alternative other than more of that same democracy which has produced all of these baleful results? Is it because they do not see the situation in this light? But Neumann points to the facts of the situation very vividly (Chapter IV), failing only to draw the inevitable conclusions. Why do they not try to measure *how large* is the dissentient minority and *how much* control is needed on the part of the dictatorship (Chapters VI and VII) and also emphasize that it is not the proletariat that is "controlled" (suppressed) but intelligent critics. And, granted that aristo-autocracy is no desirable or practicable alternative to the dictatorship of the masses and their high priests, what is? Can Mr. Neumann answer? As may be inferred, the international aspect of the situation, as of most political and social situations, is merely incidental to the main theme. PITMAN B. POTTER

The Annals of The American Academy of Political and Social Science— (September, 1942)—*Minority Peoples in a Nation at War*. Edited by J. P. Shalloo and Donald Young. Philadelphia: American Academy of Political and Social Science, 1942. pp. viii, 276. Index. Paper ed. \$2.00; cloth \$2.50.

Even those Americans who prefer foreign problems to domestic ones to worry about are becoming increasingly aware that the so-called American minority peoples of divergent racial or relatively recent alien origin include many groups which must be made more completely an integral part of the United States. This thesis is the backbone of the present compilation whose 27 chapters deal, in general, with the difficulties faced by the United States because of the existence and activities of the alien, Negro, Indian, and several selected American minorities. It is a valuable summary, even though it is an indication of investigation that needs to be done rather than a systematic survey of all the aspects of the burning questions it treats. We have here, for instance, very little about the relationship of the various sabotage devices to our minorities, or the political and cultural divisions agitating most of our so-called "loyal" minorities. These omissions are probably due to the intentions of the editors who planned the volume "to increase the understanding of American minority peoples in relation to the war so that their special problems may be appreciated and their integration into the national body may be advanced by constructive, positive measures rather than by the repressive devices likely to be engendered by war spirit." From this point of view, the Negro, Indian, German, Italian and the Japanese Americans have been given persuasive presentations of their claims,

while the so-called "new" immigrants from Eastern and Balkan Europe have been disposed of in an article which covers all the "Axis-conquered countries" in eight pages, repeats the well known facts about the settlements of these immigrants in this country, and concludes that "in America as in Europe, the various Slavic nationalities . . . during the present war, more than ever before . . . are becoming united" (p. 122)—a claim which is quite misleading and illusory when noting the differences among the American Poles, Czechs, Slovaks, Croats, Serbs, Macedonians, Bulgarians, Ukrainians, White Russians, Ruthenians, and so on. But, in spite of these faults, the book is a distinct contribution to the field. It explores a problem that is national—as well as world-wide—in interest and tells a story that is one of the most serious facing our home-front today.

JOSEPH S. ROUCEK

Banking and Finance in China. By Frank M. Tamagna. New York: Institute of Pacific Relations (Inquiry Series), 1942. pp. xxi, 400. Index. Glossary. \$4.00.

This financial and banking study is a tribute to the patience and scholarship of those Chinese authorities who, during the stress of war, give themselves to research in subjects which are far from spectacular, and which, from the standpoint of the surface observer, impede the "war effort," but which are nevertheless recognized by informed authorities as important, both in war and peace. Fortunately the Chinese do not distinguish, as absolutely as Western peoples, functional differences between war and peace pursuits. They seem to reason that something must be conserved during the war in order to make the best use of the peace to come. So it is in the case of this valuable book on banking and finance, which seeks to investigate the organization and development of banking and finance in modern China. An introduction sets forth the general contours of the study, together with some reference to the author's underlying thesis or philosophy.

The book is divided into three parts, each part following a common pattern of subject-matter and organization. Each part considers in sequence each of the following subjects: (1) the native money market; (2) the foreign money market; (3) the modern money market; and (4) the relation between the Chinese financial structure, on one hand, and the functional sectors (agricultural, commercial, industrial and public) of the Chinese economy, on the other. Part I deals with historical background and concerns banking in China before 1927. It indicates the development of Chinese financial institutions from the time of origins to the first banking transactions of the National Government. The structure of money markets in China, 1927-1937, is described in Part II. The three money markets, the credit techniques and the foreign financial policies of the banks are indicated, resulting in a period of peace in international and domestic politics, and progress in economics. The third part deals with banking and financial developments

during wartime. The alterations in the practices of the three money markets due to the impact of war, after July, 1937, and the probable financial and economic consequences in the reconstruction period to follow are covered by the author.

Lack of space prevents extended analysis of or comment on Dr. Tamagna's epoch-making volume. For one thing, he has, in so far as the English speaking and reading world is concerned, tilled new soil. Again, it is mainly a factual study, well documented. It bears all the traditional virtues of a faithful study in economics. It is written in an interesting style, and avoids the vice of usual studies in the "dismal science." And it is comprehensive. Little, if any, remains to be said. The author, in the final chapter, entitled "Financial Problems in the War Economy and Post-War Reconstruction," fortunately ventures into the field of synthesis, of rationalization, and gives a limited and cautious view of the scene which lies ahead. Japan's financial objectives and techniques in China are accurately and all too briefly described. The wartime financial policy of the National Government is analyzed and summarized. Finally, financial problems of post-war reconstruction are discussed, including monetary and banking reform, the supply of capital, and other subjects. He concludes that a "combination of foreign assistance and domestic effort" may be the only reasonable policy in solving China's post-war problem.

The book opens with an interesting preface by T. V. Soong, and concludes with an appendix, selected bibliography, and glossary, which contain information and aids of the first importance. This volume will not only serve as a handbook on wartime finance in respect of China, which alone would justify its publication, it will stand, for many years to come, the definitive study in English on Chinese finance. CHARLES E. MARTIN

BRIEFER NOTICES

Treaties and other International Acts of the United States of America. Edited by Hunter Miller. Vol. VII, Documents 173-200: 1855-1858. (Washington: Government Printing Office, 1942. pp. xxvii, 1170. \$4.00.) Following so closely the appearance of Volume VI, this volume is doubly welcome. Outstanding among the twenty-eight "documents" included are the treaties of 1858 with China (to which 138 pages are devoted) and with Japan (to which 223 pages are devoted). Some of the instruments have not previously appeared in collections of United States treaties, and some of them had not previously been published in any form. In every case, all authentic versions are reproduced, many of them for the first time. While some of the documents may not be thought to have great significance, particularly documents 181 and 190 relating to claims settlements with Guatemala and France, the editor has wisely included them and left that judgment to others. He is giving us the materials for a new approach to our treaty law, and for a new appraisal of our international policies. Lawyers will be extremely grateful for many special features of this volume, among which may be mentioned the history of the Dillon Case (pp. 153-222), and the analysis of the "peace-and-friendship clauses" in treaties with several

American Republics (pp. 779-791). The progress of the collection now makes it possible to appreciate more fully the significance of this undertaking. While many years may yet be required for its completion, it promises to give us not only the first adequate collection of United States treaties, but also a collection incomparably better than any hitherto published in any country. The fact that the volumes may be purchased at popular prices assures the wider use of the collection in the future.

MANLEY O. HUDSON

Documents on American Foreign Relations, July 1942-June 1943. Vol. IV. By Leland M. Goodrich, S. Shepard Jones and Denys P. Myers. (Boston: World Peace Foundation, 1942. pp. xlviii, 899. Index. \$3.75.) Earlier volumes of this indispensable series were divided into parts devoted to Policy, Relations with Foreign States, and National Action. The present editor has discarded that arrangement in the interests of greater accuracy and clarity, with consequent changes in chapter titles: Principles and Policy, General Statements; From Neutrality to Belligerency; Defense and the War Effort; The United Nations; The Western Hemisphere; Eastern Asia and the Pacific Area; Europe, Africa and Western Asia; Trade and Finance; Shipping and Communications; Treatment of Persons and Property; The Department of State and the Foreign Service. Splendid as are these documents portraying the period of transformation of the United States from a peace to a war status, they suffer—due to State Department withholding of material during negotiations and developments—from probably unavoidable omissions, especially documents revealing the critical developments in the Pacific area during the summer and fall of 1941 preceding the surprise attack on Pearl Harbor, of which Ambassador Grew sent timely warnings, as, for instance, his warning of November 3 not to underestimate Japanese preparedness and to expect a sudden move, and his cable of November 17 that we would be “reprehensibly somnolent” if we failed to take full precautions against a surprise attack. Despite probable gaps in other sections of the book, the collection remains an invaluable aid in understanding and appraising American foreign policy. Intellectual curiosity and desire for exact and dependable information will be both whetted and satisfied by frequent recourse to its treasury of diplomatic gems.

WILSON LEON GODSHALL

A Diplomatic History of the United States. By Samuel Flagg Bemis. Revised Edition. (New York: Henry Holt & Co., 1942. pp. viii, 934. Maps. Tables. Diagrams. Index. \$5.) This revised edition of Professor Bemis's well-known work on American diplomatic history follows the main outline of the first edition. It is still divided into three chronological periods, the material in the first two of which remain unchanged. Considerable revision, however, has taken place in the third part, dealing with the Twentieth Century. This has been brought about partly through the omission of some material in the earlier edition, but mainly through the addition of new material covering the eventful six years since 1936. The appendix in the earlier edition containing three drafts of the Covenant of the League of Nations in parallel columns has been omitted. On the other hand, three entirely new chapters have been added, several others have been revised and enlarged, and a half dozen new maps and diagrams have been added, increasing the text altogether by about 75 pages. The revision has been smoothly dovetailed into the old text. The outstanding merits of the first edition have been retained and enhanced in the revision. In his atti-

tude towards American foreign policy, Professor Bemis is neither an ardent internationalist nor a narrow isolationist. He maintains that a policy of isolation was no longer possible after 1940, because the balance of power was doubly threatened, in Europe and in Asia. Consequently, it became the "newest and most expansive principle of American foreign policy" to extend all available aid to the peoples defending themselves against aggression (p. 882), as he points out in his thoughtful and illuminating summary. The book is accurate in statements of facts. It is wise and well balanced in the interpretation of them. The new edition maintains the high standard of the old and will be welcomed heartily by all students of American diplomatic history.

JOHN M. MATHEWS

America and World Mastery. By John MacCormac (New York: Duell, Sloan & Pearce, 1942. pp. 338. Index. \$2.75.) This is a study of American foreign policy through the eyes of a *New York Times* correspondent who has served in Europe and Canada. Nothing fresh is added to our knowledge of the subject, although in approaching it from the relationship of the United States to the British Empire and in particular Canada, the author does emphasize a different perspective from the usual. In this respect the Canadian Prime Minister does not appear in a very complimentary light, but the author takes the precaution of letting the record speak for itself although through purposely selected extracts. The book is written with clarity and with a certain facility in expression, but some of the conclusions, especially relative to England, the author might choose to reconsider in the light of changes which even a single year has brought. The fact that his publishers chose to issue it in such a flimsy binding indicates perhaps that they too regarded the work as somewhat perishable in spite of the usual although unwarranted laudation they print on the jacket.

LIONEL H. LAING

The Berlin West African Conference, 1884-1885. By S. E. Crowe. (London, New York, Toronto: Longmans, Green & Co., 1942. pp. 249. Maps. Bibliography. Index. \$6.00.) This study, primarily diplomatic and political and not legal, is the most recent historical treatment of an important international conference upon which the oldest monograph was written by Jesse S. Reeves and published in 1894. It devotes eight chapters to the background of the Conference and six chapters to its history. Its purpose is to present the Conference in its true relation to contemporary history, beginning with the background of the negotiation and breakdown of the unratified Anglo-Portuguese treaty of February, 1884, which had originated through fear of French encroachments in West Africa, and to show the sordid and selfish territorial aims of the great Powers and of King Leopold II, of Belgium, who were the leading participants both in the Conference and in the ceaseless hard bargaining behind closed doors. It is a new revelation of the astuteness and duplicity of the dominating Bismarck and the self-seeking intrigues of the astute and deceitful Leopold. The author draws some interesting and significant conclusions concerning the results of the Conference. The study treats in detail the call of the Conference and the discussions of the three bases of (1) free commerce, (2) free navigation, and (3) the political obligations involved in effective occupation, and also the coincident territorial negotiations and bilateral agreements of 1885-1886 relating to the establishment and delimitation of the Congo Free State. To explain parts of the narrative, it adds 13 appendices (pp. 197-223). Following the latter, it has notes on sources, both unpublished (original) and secondary (pp. 225-231).

and a bibliography (pp. 232-237). Throughout the narrative there are extensive footnote references. Its use is also facilitated by three maps and a satisfactory index. The author has made a creditable and interesting contribution to the history of the period. The volume deserves a wide circulation

J. M. CALLAHAN

Radio Today. By Huth Arno. (Geneva: Geneva Research Centre, 1942. pp. 160. Bibliography. 40¢.) The subtitle, *The Present State of Broadcasting in the World*, is more descriptive of the subject-matter of this book. The treatment is logical and comprehensive in its concise global survey. The book consists of three parts and three annexes. Part A deals with The Structure of Broadcasting under organization and financing, transmission, programmes, and reception. Part B explores the development of the art nationally and internationally grouped in continental areas. In Part C the author devotes ten pages to new developments. He is sanguine as to the stimulating effect of war uses and ultimate revival of private initiative balanced by official control. He also appraises highly the future uses of the ultra short waves, Frequency Modulation Broadcasting, Facsimile Service and Television. In Annex I, listing the 66 most powerful long and medium wave stations in 26 countries, there is no station from the United States. Annex II significantly classifies nations as to number and density of radio homes. As to number, the United States leads with 52,000,000 sets in 29,397,000 homes. Colombia stands 37th and last with 100,000 homes. As to density per 1000 inhabitants, Sweden leads with 231.87; the United States falls in third place with 223.26, and Colombia in 37th place with 11.36. It is noteworthy that in 1938, for the first time, the total number of radio sets of 40,800,000 in use with 721 transmitting stations in the United States exceeded a total circulation of 39,571,839 of 1936 daily newspapers. The text carries footnotes. There is also a short selected bibliography together with a list of the publications of the author in the field. Most of these are written in French. Several of them treat of broadcasting in the Americas. The book is informative, non-technical, and makes a contribution to the field.

HOWARD S. LEROY

A Permanent United Nations. By Amos J. Peaslee. (New York: G. P. Putnam's Sons, 1942. pp. x, 146. Index. \$1.50.) In this work Mr. Peaslee presents his views looking toward the establishment of some form of a permanent union among the nations of the earth. Acknowledging the many splendid contributions of the German race, he, nevertheless, concludes that for generations Germany "has been a chief disturber of the peace of the world and the temporary or permanent governing of the German people should be undertaken by a United Society of Nations as a governmental organization." He would define the rights of nations which may not be infringed by any superior international authority, and delegate certain essential powers to international institutions of government of which there should be more than at present. The League of Nations system was too weak and "we forsook the American system in the League plan." For the postwar world, therefore, the author would have "a self-contained, democratic World Authority" with "adequate powers and instrumentalities and with means of financial support." These are some of the conclusions and suggestions gleaned from his own writings and addresses and presented by Mr. Peaslee in this thoughtful little volume.

J. EUGENE HARLEY

National Consciousness. By Walter Sulzbach. (Washington: American Council on Public Affairs, 1943. pp. xi, 168. Index. Cloth, \$3.00; paper, \$2.50.) There are certain basic facts of political life which are known to many but appreciated by few. One of them seems to be the fact that nations are a recent growth in history. The belief of many nationalists that—as Hans Kohn puts it in his introduction to Professor Sulzbach's book—"nationalism is innate in man, instinctive and natural and therefore eternal," is wholly unfounded. The day will come, Professor Sulzbach assures us, when national consciousness will have meaning for the historians only. It has not existed during the greatest part of history and it will not exist forever. He reaches this conclusion on the basis of scholarly discussions which emphasize the psychological factors that have been instrumental in making real the ideas of nationality, nationalism, and national consciousness. In this connection, Chapters 8 and 9 dealing with The Fighting Impulse and National Honor, respectively, will be of particular interest to the reader. In Professor Sulzbach's judgment, the basic problem of the peace conference after this war will be the adjustment of national consciousness to post-war conditions. While conceding that "the present war may possibly call a halt to the decay of national consciousness" (p. 158), yet the author holds out hope for a future which will see the end of unbridled nationalism. The question at present, he says, is simply how long national consciousness is still destined to determine the fate of mankind, and what can be done to bring about its speedy end. Here the author draws an interesting parallel between religious wars, on the one hand, and the wars fought in the era of nationalism, on the other. Just as religious intolerance has ceased to be a cause of war, so when this war is ended the concepts of national honor and prestige, derived from the idea of selfish nationalism, may lose their grip upon the mind of men and give way to a better, a more rational appreciation of international problems.

GERHART HUSSERL

Los Tratados de Montevideo y el Derecho Internacional Privado. By Elias Kraiselburd. (Buenos Aires: Editorial Claridad, 1942. pp. 110. Index. \$1 m/n.) This is a compilation of the original Montevideo Treaties on Private International Law of 1889, and the more recent revisions of 1939 and 1940, signed by Argentina, Uruguay, Peru, Bolivia, Paraguay, Chile, Brasil and Colombia. The compilation is very timely and useful. The text of these treaties is unavailable in many libraries in the United States. The volume contains an informative introduction which goes into their history. These treaties deserve to be closely studied, since they reflect more accurately than any other series of multilateral treaties to which Latin America is a party, the strictly Latin American conception of the topics with which they deal.

Los Momentos de Conexion en el Derecho de Nacionalidad. By Juan A. Lessing. (Buenos Aires: Imprenta de la Universidad, 1942. pp. 72. Bibliography.) The author of this monograph is one of the best known writers in Latin America on the Law of Nationality. He has treated well one of the most disputed phases of that difficult subject. To him the doctrine of association (*conexión*) seeks to fix the bounds between the competency of the individual State, on the one hand, and the restrictions which international law imposes on it, on the other. The monograph consists of a short introduction, and four brief chapters on the Elements of Association in General (Ch. I), the Acquisition of Nationality (Ch. II), the Loss of Nationality (Ch. III), and the Effect of Recognized and Deficient Rules (Ch. IV). The writer ex-

presses the opinion that no satisfactory basis of agreement has yet emerged from the doctrinal discussion of the subject; that it is by no means ripe for codification; that the current generalization of the principle of the *jus soli* to the exclusion of the *jus sanguinis* is contrary to international law; and that States are free to choose the system of association most convenient to each, and to discard or modify it at will. There is a bibliography and copious footnotes.

J. IRIZARRY Y PUENTE

The Near East. Harris Foundation Lectures. (Chicago: Chicago University Press, 1942. pp. xiv, 266. Index. \$2.50.) This symposium by competent authorities provides valuable factual material as well as important expressions of opinion concerning conditions in the Near East. Count Sforza treats the subject realistically and most interestingly from the point of view of a practical statesman. Professor Gibb, of Oxford University, presents the topics of Social Change and Arab Unity in a rather speculative and academic manner. Professor Baron's lectures on Prospects of Peace in Palestine really amounts to special pleading for the cause of Zionism. Professor Webster, of the London School of Economics, presents the subject of British Policy in the Near East with considerable objectivity and lack of partisanship. There is a fine breadth of view and realism in Professor Quincy Wright's lecture on The Future of the Near East. His advocacy of an "international religious reserve" in Palestine would seem to be a much more rational, just and feasible solution than the Jewish State favored by Professor Baron. The texts of recent important statements and treaty agreements concerning the Near East are appended.

P. M. B.

Post-Mortem on Malaya. By Virginia Thompson. I. P. R., International Research Series. (New York: Macmillan Co., 1943. pp. xix, 323. \$3.00.) That the selection of a title for a study on British Malaya after the Japanese occupation would involve some embarrassment can readily be understood, but that apparently does not explain the title of the book under review. The conclusion suggested by the title—that British policy in Malaya was a failure and that its failure was largely responsible for the fall of the country to the Japanese—is clearly the argument of the study. That the British were not able to hold Malaya against Japanese aggression is a fact, but that fact alone does not prove that British rule in Malaya was a failure, any more than the fall of the Philippines proves the failure of American policy in that Asiatic dependency, unless it is assumed that the chief function of colonial government is to make dependencies impregnable against military attack. Miss Thompson points to some undeniably grave weaknesses in British policy. But even if the British had followed a policy in every respect as Miss Thompson would have had it, Malaya would still have been a weak country militarily. Miss Thompson in this study seems to have lost sight of the fundamental problems of the countries of this region. The basic problems of all the countries of Southeastern Asia are very much alike, and in none of these countries have they been solved. There are vicious circles in their economic and social structures which are difficult to break. Western standards of administration and social services (and now some would add Western standards of military power) are demanded by all classes, and especially by Western liberals and native nationalists. These, however, cannot be supported by the native economy but only by Western methods of production. Once the Western enterprises have been introduced, the government becomes financially dependent on them. Moreover, the problem of

getting the native population to share in the ownership and management of these enterprises is almost insuperable. In this study, sharp, and generally not unjust, criticisms are made of individual policies, but nowhere are the policies related to each other or viewed as a whole. A clear picture emerges from none of the chapters and naturally none from the book. A few tables would have improved the book considerably. A chapter on "Tin and Smelting" does not once mention the smelters. Conspicuously absent from the bibliography are government documents and reports.

AMRY VANDENBOSCH

For Permanent Victory: The Case for an American Arsenal of Peace. By Melvin M. Johnson, Jr., and Charles T. Haven. (New York: William Morrow & Co., 1942. pp. 246. \$2.50.) This is another of the "post-war" books, so popular today, and may be said to represent the viewpoint of the professional military man on the subject. The book does not deal with problems of political or economic reorganization, but rather with the problem of adequate military preparedness to enforce the future peace and prevent aggression. The central theme is that the United States has never been well prepared for any of its past wars, that many American lives have been needlessly lost for this reason, and that hereafter we should see to it that our military establishment is better supplied with modern equipment and trained men, and supported by a private industry capable of converting quickly and effectively to the production of large quantities of war material. The major portion of the book is a historical account of our military preparedness (or unpreparedness) in previous wars, the types of armaments used, the relative training of our armed forces, the status of our armaments industries, and a comparison of our military establishment with those of our enemies. The authors conclude that if we are to achieve permanent victory after this war we must be prepared, either alone or in coöperation with other States, to enforce a system of law and justice among nations. They express no opinion as to the type of international law enforcing agency to be set up, nor do they analyze the political implications involved in such a step. The underlying tenor of the entire volume, however, leans toward a nationalistic approach to the problem of security rather than an international approach.

ELTON ATWATER

Social Insurance and Allied Services. Report by Sir William Beveridge. (New York: Macmillan Co., 1942. pp. 299. \$1.00.) This widely heralded Beveridge Report is of importance to students of international law because of the part it appears to be playing in the discussion of post-war problems. For the international law of the future is being thought of not only as involving the organization of the political and economic relations of States, but as extending even to the establishment of certain standards of social welfare within the individual States. The Atlantic Charter, now the Charter of the United Nations, pledges the collaboration of its signatories in the interest of improved labor standards, economic advancement and social security. The author of this Report refers to its proposals as designed to be a practical contribution towards the achievement of the "social security" referred to in the Atlantic Charter and as covering ground "which must be covered, in one way or another, in translating the words of the Atlantic Charter into deeds." The proposals of the Report extend the conception of social security to include a plan of abolishing want "by ensuring that every citizen willing to serve according to his powers has at all times an income sufficient

to meet his responsibilities." The plan is based upon what is called a "diagnosis of want," and its main feature is a scheme of social insurance "against interruption and destruction of earning power and for special expenditure arising at birth, marriage or death." While its specific provisions are directed towards the situation which the author anticipates will arise in Great Britain after the war, the Report approaches its problem in such a comprehensive way as to be of value to those in other countries who have before them the same general objective.

C. G. FENWICK

Italy from Within. By Richard G. Massock. (New York: Macmillan Co., 1943. pp. ix, 400. \$3.00.) This volume by the former Chief of the Rome Bureau of the Associated Press is a lucid and comprehensive account of Italian life under Fascism. Special attention is given to Italy's international relations, particularly during the more recent period from the Stresa Conference, which shortly preceded the invasion of Ethiopia, to the declaration of war against the United States. For the student of international relations this is the most important period of the Fascist régime, for it was only in 1935 that Mussolini, under the pressure of economic difficulties and on the assumption that the democracies would not fight, deliberately embarked upon a policy of open aggression which was inevitably to result in Italy's declaration of war against the United States. The highlights of this sad story are familiar. They are the invasion of Ethiopia, the intervention in Spain, Italy's support of Hitler's blackmail at Munich, the invasion of Albania, the tragic farce of non-belligerency, the invasion of Greece, the creation of the puppet kingdom of Croatia, and, finally, the loss of Ethiopia and the defeats of Libya, both clear premonitions of Mussolini's impending doom. Of each of these events and of many other minor episodes of Italy's international policy, the author explains briefly the historical background and gives a factual account in which the relationship between the domestic and international policy of Fascism is clearly explained. The book proves conclusively that from the very beginning of the crisis which resulted in the present war Mussolini was determined to take sides with Germany; it also conveys the impression that no serious differences as to Italy's policy ever existed between the King and the Duce. The gradual transformation of the German-Italian coöperation into a master and servant relationship and the rapid deterioration of Italy's morale during the present war are clearly depicted. Many episodes of Italian life scarcely known within Italy itself because of the Fascist censorship are described in this book, which is useful reading for everyone who wants to understand Italy's life under Fascism and what may happen within that country in the near future.

ANGELO PIERO SERENI

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* Mention here does not preclude a later review.

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WILBUR S. FINCH

THE SUEZ CANAL AS AN INTERNATIONAL WATERWAY

By HALFORD L. HOSKINS

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and Diplomacy*

The Suez Canal, opened for general use on November 17, 1869, more than justified the gloomy predictions of its opponents that it would become "un second Bosphore."¹ Abbreviating by hundreds or thousands of miles the transit distance between important parts of the globe, it wrought a kind of revolution in maritime activities and particularly in strategical concepts of peace and war. Its consummation brought to an end more than a score of years of controversy marked by the efforts of the British Government to quash a project certain to destroy the monopoly of sea access to East Africa and the Middle and Far East via the Cape of Good Hope. Until 1869 the protection of British interests in the East had required only the maintenance of naval supremacy among the European States and a close surveillance of the Eastern Mediterranean with Malta and Constantinople as points of vantage. The cutting through of the Isthmus of Suez instantly destroyed previous schemes of British strategy by giving an almost infinite extension to the shores of the Mediterranean. With a similar projection of the problems of the Mediterranean, fundamental changes in planning and procedure, both by Great Britain and by other European States having maritime interests, were unavoidable.²

The Suez waterway was constructed by the *Compagnie Universelle du Canal Maritime de Suez*, of which the Frenchman, Ferdinand de Lesseps, was founder and principal promoter. The company was set up and operated by virtue of two concessions by Saïd Pasha of Egypt, dated November 30, 1854, and January 5, 1856, tardily confirmed by a firman issued by the Sultan of Turkey March 19, 1866. The character of the company was poorly defined at the outset and was only determined by various types of litigation extending over a considerable number of years. Confusion arose from the facts that (1) the company, ostensibly international, was predominantly French; (2) its corporate offices were established in Paris, where all meetings of stockholders were held, while its administrative headquarters were located in Alexandria; and (3) its operations as an international waterway under its own statutes, while subject in certain respects to the provisions of the French

¹ Cf. F. de Lesseps, *Inquiry into the Opinions of the Commercial Classes of Great Britain on the Suez Ship Canal* (London, 1857), p. 128; *Quarterly Review*, Vol. 102, pp. 354-362.

² H. L. Hoskins, "British Policy in Africa, 1873-1877," *The Geographical Review*, XXXII, 140-149.

code and in others to Egyptian ordinances and Turkish regulations, actually were independent of international control.³

The international status of the Suez waterway during its period of construction and several years following its completion was quite as uncertain as that of the organization which brought it into existence. De Lesseps himself had called attention in 1856 to the desirability of reaching an international understanding with reference to the use and protection of the Canal. The Viceroy's concession of 1856, and consequently the statutes of the company based thereon, provided that the Canal should be open to all vessels of all nations, in time of peace and in time of war.⁴ The regulations of the company, a commercial corporation, of course had no value in international law, but they did provide a kind of *modus operandi* until the Canal became enmeshed in the toils of diplomacy in the late 1870's. Meanwhile, the company, in an agreement of February, 1866, expressly recognized the right of the Egyptian Government to police the Canal and defend it against attack from outside, provided that free navigation of the waterway were assured—a step which helped subsequently in defining the relationship of the operating corporation to the sources of political authority.⁵ No question ever has been raised concerning the Canal as a part of the territory of Egypt, and Egyptian tribunals have left no doubt on this point.⁶

The Franco-German War, which occurred in 1870–71 shortly after the opening of the Suez waterway, raised no definite Canal issues, although vessels of both belligerents passed through the Canal freely. The outbreak of war in April, 1877, between Russia and Turkey, however, produced a critical situation at once, inasmuch as the Canal lay in territory under Turkish suzerainty. The possibility that the Canal might become a zone of hostilities brought into the open the fact that Great Britain already had assumed the rôle of protector of the Canal. In November, 1875, the British Government had purchased a large block of Egyptian shares in the Suez Canal Company, less with a view to controlling the operations of the company than to establishing, in the absence of any international agreement, a strong position relative to the defense of that waterway which already had come to play

³ Among the many historians of the Suez Canal, the following are authoritative and probably are most useful in connection with the present study: Pierre Crabitès, *The Spoliation of Suez* (London, 1940); C. W. Hallberg, *The Suez Canal* (New York, 1931); H. L. Hoskins, *British Routes to India* (New York, 1928); T. J. Lawrence, *The Suez in International Law* (London, 1884); J. Charles-Roux, *L'Isthme et le Canal de Suez*, 2 vols. (Paris, 1901); Lt.-Col. Sir A. T. Wilson, *The Suez Canal* (London, 1933); together with appropriate portions of Georges Douin, *Histoire du Règne du Khédive Ismaïl* (3 vols. in 4 published: 5 vols. projected: Rome, 1933–1938); and M. Sabry, *L'Empire Égyptien sous Ismaïl et l'Ingérence Anglo-Française* (Paris, 1933).

⁴ The company's statutes are given in Wilson, *op. cit.*, Appendix 3, pp. 179–191.

⁵ Convention entre le Vice-Roi d'Égypte et la Compagnie Universelle du Canal Maritime de Suez, signé au Caire, le 22 février, 1866; quoted in part in Wilson, *op. cit.*, pp. 191–193.

⁶ Paul Fauchille, *Traité de droit international public* (Paris, 1925), I, Pt. 2, p. 297.

an important part in British imperial affairs.⁷ Further to strengthen this position after the opening of the Russo-Turkish War, there was signed at Alexandria on September 7, 1877 (subject to the approval of the Ottoman Porte), an Anglo-Egyptian agreement which, to all intents and purposes, envisaged Great Britain as the protector of Egyptian territorial interests.⁸ Already, on May 6, 1877, the British Government had despatched a note to Russia defining British interests in Egypt and elsewhere in the Near East. Russia was warned that any attempt to block or intercept communications via the Suez Canal would be inconsistent with the maintenance by Britain of a neutral policy.⁹ In May of the following year, in consequence of rumors of Russian designs upon the Canal, and with British naval units already stationed at Alexandria and Port Said, the Egyptian Government was promised as many more ships as the Egyptian Navy might require in order to ensure the safety of the Canal and the Red Sea.¹⁰

While the steps taken by the British Government were in fact sufficient to prevent any interference with the navigation of the Canal, the sanction for this rested solely on their own action and on their resolution to protect their own interests and those of other neutral States. There was no clearly defined legal right which could be cited as warrant for the deed. There was no obligation for the Porte or the Government of Egypt, on the one hand, or the Russian Government, on the other, to refrain from acts which would have impeded Canal operations.¹¹ Direct British intervention in the affairs of Egypt in 1882, precipitated by the crude revolt of Ahmed Arabi Pasha, compromised the British position still further. In the course of the operations leading to the armed occupation of that country, British troops actually used the Canal as a basis for attack and temporarily interrupted the commercial use of the Canal. This gave emphasis to the need for a general agreement with respect to the status of the Canal. Consequently, not more than a month after the battle of Tel-el-Kebir, Lord Granville was saying to Count Herbert Bismarck, "We wish to suggest that free passage through the Suez Canal in time of peace and war be secured to all sea-faring nations under an international guarantee of the Powers."¹² Early in the following year, definite proposals were brought forward by the British Foreign Secretary, acting on behalf of the Khedive. The formula proposed in this circular note (January 3, 1883) assiduously avoided any suggestion of neutralizing the Canal (Lord Granville had said, "We can

⁷ London Times, Nov. 26 and Dec. 2, 1875; Parliamentary Paper, Egypt No. 1 (1876) (Cd. 1391).

⁸ FO 78/3189. The agreement was drawn up on Aug. 4, 1877.

⁹ E. Hertslet, *Map of Europe by Treaty* (4 vols., London, 1875-91), IV, 2615-2617; Hoskins, *op. cit.*, p. 475.

¹⁰ FO 78/2851, Sir J. Pauncefote to Mr. Vivian, May 3, 1878; FO 195/1194, Vivian to Admiral Lord John Hay, May 14, 1878.

¹¹ Sir James Headlam-Morley, *Studies in Diplomatic History* (London, 1930), p. 77.

¹² *Die Grosse Politik der Europäischen Kabinette* (40 vols., Berlin, 1922-27), IV, 42.

never agree to the Suez Canal being neutralized"), but it did in substance propose to regularize its use, in time of peace and war, by declaring the channel to be "free for the passage of all ships in any circumstances," forbidding hostilities within its precincts, providing for the defense of Egypt, and leaving to the Government of Egypt the responsibility of enforcing these measures.¹³ Inasmuch as the Government of Egypt during the period of occupation obviously stemmed from Whitehall, it is apparent that Egypt was to be merely a stalking horse.

Response from the envious Powers was slow, although some progress toward an arrangement satisfactory to all interests was made during the next two years. In 1885 an ambassadorial conference meeting in London to consider the financial affairs of Egypt arranged for a seven-Power conference in Paris to discuss the international character of the Suez Canal.¹⁴ At French insistence, the Paris Conference incorporated in a draft treaty a provision for an international canal commission, an arrangement accepted by the British Government only after attaching a broad reservation that the agreement should not be understood to "fetter the liberty of action of Her Majesty's Government during the occupation of Egypt."¹⁵ The Conference of 1885 ended inconclusively. Negotiations continued through the months following, with France and Turkey in particular, attempting to discover bases on which the British would be willing to withdraw from Egypt. A draft convention prepared by the British Foreign Office in 1888, based on that of 1885, proving to be acceptable to the Powers concerned, it was formally signed at Constantinople on October 29, 1888 (ratified subsequently), by representatives of Great Britain, France, Germany, Austria-Hungary, Italy, Russia, Spain, Turkey and The Netherlands.¹⁶ Although this action provided for neither neutralization nor internationalization in the usual sense of those terms, it did give the Canal an international status, one which with modifications still obtains.¹⁷ The Canal was declared to be open to all vessels, whether merchant or war ships, in time of war as in time of peace. The Canal was not to be blockaded; no acts of hostility were to be committed within its precincts; no permanent fortifications were to be erected along its line. Further clauses defined regulations for the use of the Canal in time of war. In case of danger the Egyptian Government was to take the necessary measures. The British refused to concede jurisdiction of any kind to an international commission as such, but consular agents of the signatory

¹³ Hallberg, *op. cit.*, p. 285.

¹⁴ Headlem-Morley, *op. cit.*, p. 77.

¹⁵ Parliamentary Paper, Egypt No. 16 (1885) and Egypt No. 19 (1885).

¹⁶ *Ibid.*, No. 1 (1888); British and Foreign State Papers, Vol. 79, pp. 18-22.

¹⁷ Contrasting views as to the neutralization of the Canal are to be found in T. J. Lawrence, *The Principles of International Law* (Boston, 1895), p. 490; T. E. Holland, *Studies in International Law* (Oxford, 1898), pp. 270-293; L. Oppenheim, *International Law* (London, 1927), II, 148, 166; C. H. Stockton, *Outlines of International Law* (New York, 1914), pp. 137-139; and elsewhere.

Powers were authorized to maintain an innocuous kind of surveillance over Canal affairs with respect to the carrying out of the provisions of the Convention.

In one important respect the Convention of 1888 was anomalous. While it brought the waterway under international protection and made Egypt *mandataire* for the carrying out of its provisions, all of the signatory Powers, including Turkey, ratified it with the reservation by Lord Salisbury (originally brought forward in 1885 by Sir Julian Pauncefote) that "in so far as the Treaty is incompatible with the transitional and exceptional situation and would impede the liberty of action of the British Government during the occupation," Great Britain might consider itself free to disregard the terms of the Convention.¹⁸ France accepted this reservation with the understanding that all of the Powers might take advantage of it. The Convention thus was reduced to an academic declaration and remained technically inoperative.¹⁹ Before any exigencies of war had discovered this, however, the inconsistency had been remedied: During the negotiations between Great Britain and France which culminated in the Anglo-French agreement of April 8, 1904, in order that the Canal Convention might be brought into practical operation, the principals reiterated their adherence to the original Convention, but with the provision that those clauses which defined a complicated procedure for meetings of a canal commission should remain in abeyance.²⁰ The other original signatories having signified their acceptance of this change, the Convention tardily came into force.²¹ Upon the Government of Egypt still devolved the carrying out of the provisions of the Convention, an arrangement eminently satisfactory to Great Britain.

The few occasions prior to the outbreak of the first World War on which the Suez Canal was employed for other than normal commercial purposes served merely as instructive illustrations of the latitude of the provisions respecting the use of the waterway. During the Spanish-American War the passage of Spanish war vessels through the Canal en route to the Philippines impelled our Secretary of State to inquire of the British Government whether the United States, not a signatory to the Canal Convention of 1888, might despatch armed vessels by the Suez route. The British Foreign Secretary replied that he believed no protest would be made and that there was no distinction in this regard between signatory and non-signatory Powers.²² Lord Salisbury did not feel impelled to add that, inasmuch as the Convention was regarded as inoperative, the query was superfluous.²³ During the Russo-

¹⁸ Parliamentary Paper, Egypt, No. 1 (1888), C. 5255, p. 36; cf. G. P. Gooch, *History of Modern Europe, 1878-1919* (New York, 1923), p. 93.

¹⁹ This JOURNAL, Vol. III (1909), p. 899; Sir James Headlem-Morley, *op. cit.*, p. 79.

²⁰ G. P. Gooch and H. Temperley, *British Documents on the Origins of the War, 1898-1914* (11 vols.) (London, 1926-38), II, 326, 331-334; this JOURNAL, Vol. IV (1910), p. 349.

²¹ Bulletin of International News, XIII, 68; Gooch and Temperley, *op. cit.*, III, 18-19.

²² Foreign Relations of the United States (1898), p. 982; Fauchille, *op. cit.*, I, Pt. 2, p. 336.

²³ See Naval War College, *International Law Topics* (1930), pp. 119-120.

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Japanese War (1904-05) armed Russian vessels passed freely through the Canal in both directions, although they were operating against an ally of Great Britain.²⁴ At the outbreak of the Turco-Italian War (1911) the Egyptian Government for the first time found occasion to employ some of the powers specified in the Convention of 1888. Five Turkish gun boats which failed to quit Port Said within the time allotted (24 hours), were boarded and disarmed by Egyptian authorities.²⁵ At other times armed vessels of both belligerents employed the Canal without incident, regardless of the fact that Egypt was a part of the Ottoman Empire.

The World War, because of its comprehensive scope, added considerably to the body of precedents for subsequent instruction. At the very outset of the war the Egyptian Government issued a proclamation authorizing British military forces to exercise any right of war in Egyptian ports and territories.²⁶ But when presently (November 5, 1914) war broke out between Turkey, nominally suzerain over Egypt, and Great Britain, still in occupation of Egypt, the occupation was transformed into a British protectorate. All Egyptian ports thereupon became belligerent ports. British troops were stationed at strategic points on the Canal and the channel was closed to nocturnal use by merchant vessels—steps which could find legal warrant only under the reservation attached to the 1888 Convention. The Turks seized upon these measures as justification for the issuance of a circular notice to neutrals in May, 1915, in which they explained the necessity of extending hostilities to the Suez Canal Zone, inasmuch as the British, in contravention of the Canal Convention, were erecting fortifications along the Canal, while the French were landing troops in Egypt with a view to hostile action against Ottoman territory.²⁷

There has been no general agreement among competent authorities as to the correctness of the action taken by Great Britain and/or Egypt in some instances during the war. British writers not unnaturally have found ample justification for all war-time procedures, while others have taken the point of view that, in authorizing Britain to use Egyptian ports and facilities for war purposes other than the protection of Egypt or the Canal, Egypt violated the Convention of 1888, and that the British Government did likewise in assuming complete control of Egypt under the protectorate. In making a virtue of necessity, British authorities probably were not always on safe legal ground.²⁸ Yet despite the fact that after 1914 the Suez Canal was in

²⁴ A. S. Hershey, *International Law and Diplomacy of the Russo-Japanese War* (New York, 1906), p. 189; Fauchille, *op. cit.*, I, Pt. 2, p. 336.

²⁵ Fauchille, *op. cit.*, I, Pt. 2, p. 337. Cf. Arts. 4 and 7 of the Convention of 1888, and decrees of February, 1904.

²⁶ R. L. Buell, "The Suez Canal and League Sanctions," *Geneva Special Studies*, VI (1935), p. 6.

²⁷ Fauchille, *op. cit.*, I, Pt. 2, pp. 337-338; the circular is quoted in *International Law Topics* (1917), pp. 221-222.

²⁸ M. C. de Freycinet, *La Question d'Egypte* (Paris, 1904), p. 327.

every essential a British waterway and an Allied line of communications, the Canal Convention was given rather more than lip service. Except for the sequestration of enemy vessels suspected of contemplating hostile acts or believed to be destined for conversion into armed raiders, procedures taken with regard to German merchant vessels entering Canal precincts may be considered entirely appropriate. Action taken by the Egyptian authorities, for example, in detaining some Turkish and German vessels and in forcing others to quit Egyptian ports (a step involving certain capture) was upheld by the British Government, which declared it inadmissible (October 23, 1914) that the right of free access to and use of the Canal could imply a right to use the waterway and its ports for an indefinite time in order to escape capture, because the use of these ports for refuge was not envisaged by the Suez Canal Convention and the manifest effect of such usage would be to endanger the Canal and perhaps to render it useless to other vessels.²⁹ The prefatory remarks of the British Prize Court at Alexandria in the case of the German steamship *Gutenfels* perhaps bear as much significance as the formal decision in the case: "There is a grim touch of humor about the present situation, seeing that the Ottoman Government, under German direction, is at this moment seeking to destroy the Canal, while a German ship taken by the British Government asks in a British prize court for a release on the ground that the canal precincts are absolutely inviolable."³⁰

The treaties signed at the close of the World War not only regularized war-time acts and policies of the victorious Powers but also attempted to mend such breaches as had occurred in the international fabric. By Part IV, Section VI, of the Treaty of Versailles, Germany consented to the transfer to the British Government of all powers conferred upon the Sultan of Turkey by the Convention of 1888 relating to the Suez Canal. Likewise it recognized the British protectorate in Egypt as of August 4, 1914.³¹ Similar clauses were contained in the treaties of St. Germain and Trianon with Austria and Hungary, and Sèvres (later Lausanne) with Turkey. This substitution of British for Ottoman authority merely formalized a situation which had existed in most essentials since 1882 and in all since 1914.

The abolition of the British protectorate and the creation of a nominally independent Kingdom of Egypt raised some questions regarding the international position of the Canal. These might have been more serious except

²⁹ Fauchille, *op. cit.*, I, Pt. 2, p. 338.

³⁰ British and Colonial Prize Cases (London, 1916), I, 102, iii. The *Gutenfels* arrived at Port Said Aug. 5, 1914, and was given until sunset on Aug. 14 to refuel and depart. The vessel chose to remain. On Oct. 13 she was boarded by an Egyptian crew and sailed into the Mediterranean beyond territorial waters, where she was seized by a British vessel as a prize of war. The owners demanded restitution on the ground that Port Said was a neutral port, guaranteed by the Suez Canal Convention.

³¹ British and Foreign State Papers, Vol. 112, p. 79. The treaties terminating the war with the other Central Powers are incorporated in this volume.

X

for British determination to relinquish no portion of the special rights which had been preserved since 1888. The unilateral declaration of February 28, 1922, "absolutely reserved to the discretion of His Majesty's Government," among other matters, (a) the security of the communications of the British Government in Egypt, and (b) the defense of Egypt against all foreign aggression or interference.³² Both in this declaration and in a notification to the Powers, on March 15, of the termination of the protectorate, it was made clear that, pending the conclusion of agreements on such reserved points, the *status quo* was to remain intact.³³ That is to say, the price of Egyptian independence in other respects was to be the retention by Great Britain of such rights and powers as would insure as favorable a position relative to imperial communications in particular and other interests incidentally as was maintained under the protectorate. These public declarations appear to have been based on the assumption that, since the special position occupied by Great Britain relative to the Canal since 1888 (then lately re-acknowledged by the Powers in being embodied in the post-war treaty settlement) had existed prior to the protectorate, it would be unaffected by the establishment of Egyptian independence.³⁴

This assumption is exemplified repeatedly during the years immediately following the granting of Egyptian independence, not only by the character of the negotiations between Great Britain and Egypt respecting the reserved points of 1922, but also in public pronouncements of the British Government. In 1924 the question arose as to the situation which might arise were the Geneva Protocol for the Pacific Settlement of International Disputes—open for signature by members and non-members of the League of Nations—to be signed by Egypt. To allay any doubt, the British Foreign Office on November 19, 1924, issued a note citing the reservations in the declaration of February 28, 1922, and the content of the circular note of March 15 of the same year, and concluding: "In these circumstances His Majesty's Government are unable to admit that the Protocol, if signed by Egypt, will enable the Egyptian Government to invoke the intervention of the League of Nations in settlement of matters absolutely reserved . . . to the discretion of His Majesty's Government."³⁵ Likewise in a separate note which accompanied the signing of the Kellogg Pact by a British representation in August, 1928, reference was made to "certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace

³² Parliamentary Paper, 1922, Cmd. 1592, "Correspondence Respecting Affairs in Egypt" [in continuation of "Egypt No. 4, (1921)."]; Royal Institute of International Affairs, Information Department Papers, No. 19, "Great Britain and Egypt, 1914-1936" (New York, 1936), pp. 11-12.

³³ Parliamentary Paper, Egypt No. 2. (1922), Cmd. 1617, "Despatch to His Majesty's Representatives Abroad respecting the Status of Egypt."

³⁴ Cf. R. L. Buell, *op. cit.*, p. 8; Headlem-Morley, *op. cit.*, pp. 97-101.

³⁵ Quoted in A. J. Toynbee, *Survey of International Affairs*, 1925 (London, 1927), Vol. 1, p. 212.

and safety . . ." It continued, "It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect."³⁶

Meanwhile, Great Britain's position in Egypt with reference to the "reserved" points, if not uncertain, was at least unsatisfactory. Relations between the two States after the declaration of February, 1922, instead of improving, continued, on the whole, to deteriorate. The new Egyptian Government, believing itself to be in a strong bargaining position and unwilling to be content with anything short of complete independence in all matters affecting Egyptian sovereignty, consistently refused to recognize extraordinary British rights with regard either to communications or other special interests. Between 1922 and 1930 several attempts were made to reach a common ground of understanding, all of which were defeated by the unwillingness of Great Britain even to contemplate relinquishing the protection of the Suez Canal (and other less essential interests) either to Egypt or to the League.³⁷ A draft treaty of 1930, providing for the termination of British military occupation in Egypt proper, but authorizing the maintenance of British armed forces near Ismailia for the defence of the Canal in conjunction with the Egyptian army, came within a measurable distance of success, but foundered on the Sudan question.³⁸ A grave new threat to the entire Arabian quarter of Africa was required to bring Anglo-Egyptian issues to the point of settlement.

Italy undertook a "total solution" of claims against Ethiopia in the autumn of 1935 and commenced moving immense numbers of troops and quantities of *matériel* to East Africa through the Suez Canal. The League of Nations thereupon adjudged Italy an aggressor in contravention of the terms of the Covenant and officially applied sanctions.³⁹ The question

³⁶ Parliamentary Paper, United States No. 1 (1928), Cmd. 3109, "Correspondence with the United States Ambassador respecting the United States Proposal for the renunciation of War," May 19, 1928, p. 25. The reservation was repeated in "Further Correspondence . . .," note of July 18, 1928: United States No. 2 (1928), Cmd. 3153, p. 10. Cf. Hunter Miller, *The Peace Pact of Paris* (New York, 1928), p. 69.

³⁷ Anglo-Egyptian relations during these years are well treated in Lord Lloyd's *Egypt* since Cromer, 2 vols. (London, 1933).

³⁸ Parliamentary Paper, Egypt No. 1 (1930), Cmd. 3575, "Papers regarding the recent negotiations for an Anglo-Egyptian settlement." Cf. also Royal Institute of International Affairs, Information Department Papers, No. 19, *op. cit.*, pp. 22-37, and Elizabeth P. McCallum, "Egypt: a Decade of Political Development," Foreign Policy Association Information Service, VI (Jan. 7, 1931). While the present study is concerned particularly with those reservations of 1922 which related to the Suez Canal, it may appropriately be noted in passing that the Sudan question, the fourth of the reserved points, was not unrelated to the security of the Canal. Through the Sudan flowed Nile water which was vital not only to the normal life and activity of the inhabited portions of Egypt, but also the operation of the Canal itself, which depends on the continuous flow of the Fresh Water Canal, itself a branch of the Nile.

³⁹ League of Nations, Official Journal, Vol. 16 (1935), pp. 1225, 1226.

arose immediately whether Italy might be denied the use of the Canal, and if so, under what circumstances. The evolutionary stages through which the Convention of 1888 had passed, the changes which had occurred in the status of Egypt since the time of the British occupation, and varying interpretations of the relevant portions of the Covenant of the League, all combined to provide a field day for authorities in international law and statesmen alike in the consideration of this question.⁴⁰ It would be unprofitable here to attempt to summarize all of the arguments illustrative of the several schools of thought which were born of the national interests, historical precedents and international engagements embraced by the issue. Generally speaking, there was a disposition by commentators to see a fundamental inconsistency between the League Covenant and the Constantinople Convention of 1888, and hence, by virtue of Article 20 of the Covenant—"the members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof"—to regard the Convention as abrogated, or at all events, superseded. Logic then led to the conclusion that under Article 16 of the Covenant, the Canal might be closed to Italy, or at least blockaded, "in resisting any special measures aimed at one of their number by the covenant-breaking state."⁴¹ A practical problem in this respect was found in the possibility that, in order to avoid the hazard of war with Italy, Great Britain, the logical instrument of the League in the application of sanctions to the Suez waterway, might not only be unwilling to surrender a special position relative to the Canal under the Convention of 1888, but might even insist on maintaining the provision stated in Article 1 of that engagement that "The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."⁴²

It was not, in any case, certain that an inconsistency existed between the terms of the Covenant and the Canal Convention. None had been discovered prior to 1935, and no argument could prove that those who framed

⁴⁰ For more extended summaries and analyses of the legal questions involved, see R. L. Buell, *op. cit.*, pp. 11-14; Amedeo Giannini, "*Il regime giuridica del Canale di Suez*," *Oriente Moderno*, Vol. 15 (1935), pp. 297-307; Raymond Guibal, *Peut-on fermer le Canal de Suez?* (Paris, 1938), 2ème partie; Werner Landecker, "*Suez Kanal und italienisch-ägyptischer Konflikt*," *Revue de Droit International*, 1935, pp. 204-220.

⁴¹ Not a few Britons were persuaded that the arrangement of 1888 was incompatible with the League Covenant and hence could not be regarded any longer as constituting an obligation to which the British Government must adhere. On June 7, 1935, two members of the House of Commons, Messrs. Atlee and Mander, arguing on this basis, maintained that Great Britain should close the Canal in the application of sanctions under Art. 16 of the Covenant. Royal Institute of International Affairs, *Bulletin of International News*, Vol. 12, p. 67 ff. The *Law Times* for July 27, 1935, advanced a similar point of view. Cf. editorial in the *New York Times*, Aug. 11, 1935.

⁴² Royal Institute of International Affairs, *Bulletin of International News*, Vol. 12, "The International Status of the Suez Canal," pp. 70-72.

Article 20 of the Covenant intended that it should apply to such an engagement. In fact, as has been pointed out above, the Convention was expressly affirmed in the peace treaties of which the Covenant was a part.⁴³ Italian writers not unnaturally maintained that the Convention was operative, that Great Britain was charged with its enforcement and that it was not superseded by the Covenant.⁴⁴ At the same time, they, together with most of the other disputants, chose to overlook the cogent fact that, as administrator of the Suez Canal Convention, Great Britain might find clearer warrant, under the reservation which had become essentially an integral part of the Convention and which empowered that State to take such action as might seem necessary to insure the safety of the Canal or of Egypt, for closing the Canal to Italian transports of munitions vessels than the League could discover in Article 16 of the Covenant.⁴⁵

Whatever the virtues of the several arguments for and against the proposition that Italy might be denied access to Ethiopia through this particular international waterway, the question remained an academic one. The Council of the League, on the one hand, and the British Government, on the other, found their respective positions too delicate to admit of adventures in the twilight zone of international law. It is interesting to observe, however, that no hypothesis advanced during the course of the Ethiopian crisis as to the continued existence or potency of the Suez Canal Convention appears to have affected in the least its place in British foreign policy. The Canal Convention still obtains: the Covenant has passed into history.

Dangers inherent in the Ethiopian campaign and the rise of Italian East Africa at last brought Great Britain and Egypt to the settlement of points held in abeyance since 1922. On August 26, 1936, a treaty of alliance was concluded between the two States, embracing all of the points at issue.⁴⁶ Article 8 of this treaty secured to Great Britain substantially the same rights with reference to the protection of the Canal as had been maintained since the early days of the occupation of Egypt, albeit in a form much more acceptable to the latter State. By the terms of this engagement, the military occupation of Egypt was ended, but Great Britain remained charged with the defense of the Canal until such time as Egypt may possess sufficient strength to undertake the task alone. Any rights pertaining to Great Britain by virtue of the Convention of 1888 are nowhere alluded to, yet a long-standing obligation to make sure of the defense of the Canal is implied on the part of Great Britain. No longer does the latter act in the name of Egypt: now

⁴³ Art. 152 and 282 of the Treaty of Versailles (1919) and Art. 89 of the Treaty of Lausanne (1923) specifically recognize the continuation in force of the Suez Canal Convention.

⁴⁴ Cf. the article, "*Il Canale di Suez e l'Etiopia*," in *Affari Esteri*, June 15, 1935.

⁴⁵ H. L. Hoskins, "The Suez Canal in Time of War," *Foreign Affairs*, Vol. 14 (1935-1936), p. 101.

⁴⁶ Parliamentary Paper, Treaty Series No. 6 (1937), Cmd. 5360, "Treaty of Alliance between His Majesty in respect of the United Kingdom, and His Majesty the King of Egypt."

that the two States are to continue in close alliance, responsibilities pertaining to the defense of common interests are to be shared.⁴⁷

That the British Government has regarded its position in Egypt as essentially unchanged by any of the events since the close of the first World War is indicated by the terms of the Anglo-Italian Agreement of April 16, 1938. In many of its essentials, this arrangement was a direct outgrowth of the critical situation which developed toward the close of 1935 when the possible application of League sanction to effect the exclusion of Italy from the Suez Canal was being seriously considered. In spite of many differences between Great Britain and Italy during the months following, and the insistent demands by spokesmen of the latter Power that Italy be accorded a substantial share in the direction of commercial affairs, the Italian Government was at pains not to be offensive to the point where access to East Africa through the Canal might actually be cut off. In March, 1938, the Italian Government approached British authorities, asking for a reaffirmation of liberty of transit through the Canal. This gave rise to discussions which culminated in the course of the following month in an accord, parts of which went far toward confirming Italy in newly ill-gotten gains in East Africa and actually recognized that State as a partner with Great Britain in the Red Sea area. Annex 8 in this connection is particularly significant. It declares: "The Government of the United Kingdom and the Italian Government hereby reaffirm their intention always to respect and to abide by the provisions of the Convention signed at Constantinople October 29, 1888, which guarantees at all times for all Powers free use of the Suez Canal."⁴⁸ The fact that Egypt adhered to this agreement while the League of Nations was still extant⁴⁹ undoubtedly supplies an instructive lesson to those who, from time to time, have found the broad tracks of basic national policy of a great State less easily followed than the sharper spoor of legal logic, and so not infrequently have been misled into aimless by-paths. The agreement of April 16, 1938, had not come into force when the present war opened. Nevertheless Annex 8 shows an unbroken line of descent, from the early days of the British occupation of Egypt to the present time, of the principle that the peculiar character of British interests in the East entitle that State to a special position in Egypt for the purpose of serving the international community as the guardian of the Suez highway.

✓ The early period of the present war has seen no appreciable change in the international relationships of the Canal. In June, 1940, Italy as an Axis member, relying on huge armed forces in North and East Africa and con-

⁴⁷ Parliamentary Paper, Treaty Series No. 6 (1937), Cmd. 5360, "Treaty of Alliance between His Majesty in respect of the United Kingdom, and His Majesty the King of Egypt," p. 5.

⁴⁸ Parliamentary Paper, Treaty Series No. 31 (1938), Cmd. 5726: I, "Agreement between the United Kingdom and Italy," p. 24; New York Times, April 17, 1938.

⁴⁹ Parliamentary Paper, Treaty Series No. 31 (1938), Cmd. 5726: II, pp. 37, 38.

fidant of aerial and naval strength in the Mediterranean, elected to seek a complete attainment of aims and aspirations by process of war. Since these aspirations included the control of Egypt and the Suez Canal, Great Britain was called upon to exercise those protective powers which had been retained through so many vicissitudes. As early as April, 1939, precautionary measures were taken for the safety of the Canal by the British military and naval forces in Egypt, together with the Egyptian Government and the Suez Canal Company, to guard against sudden seizure of strategic points along the Canal by Italian forces. In the following September the Suez Canal Company issued a circular, coincident with the proclamation of a state of siege in Egypt, containing notification of the taking over of all navigation through the Canal by the military authorities under the direction of a Canal Governorate established at Ismailia.

Upon the collapse of France and the severance of contact between the organization of the Suez Canal Company in Egypt and the main offices in France in August, 1940, the British Government took over the entire supervision and control of the company's interests in Egypt, operational and financial alike, this control being exercised through the senior British naval officer in command of Canal defenses. The Superior Agent of the company in Egypt, as the acting representative of the corporation, continued to be consulted, however, in all matters of importance. These measures, which bid fair to continue throughout the war, have served effectually to maintain the Canal as an artery for both commercial and naval vessels. Meanwhile the Canal has not escaped attack by Axis air forces, and on a few occasions traffic has been interrupted temporarily as a result of bombing raids and mining activities. The present situation, consequently, is not unlike that which developed in the course of the first World War when German and Turkish forces professed to find in British defensive measures sufficient ground for hostile action against an international waterway. It may be presumed that the British Government at the close of the present war will be able no less successfully than on the prior occasion to show that all measures taken during war-time have been in accordance with international conventions to which at one time or another its enemies have adhered.

THE COMING OF ECONOMIC SANCTIONS INTO AMERICAN PRACTICE

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Political institutions attain their stature largely by organic growth, taking form through a process of evolving practice. In this connection the economic sanctions developed by the United States in the years immediately preceding Pearl Harbor have much significance. As the architects of a new world order now draw up plans for the defense of the international community against war, they can include economic sanctions with greater assurance of American approval than in 1919. For certain types of such sanctions have in the last few years taken their place among our precedents, and the United States may well be expected to view proposals for their use with a more friendly eye than at the close of the first World War.

In the years following the armistice of 1918, despite the greatly altered position of the United States in the world community, American respect for impartial neutrality was still strong. That sentiment had been built up by the justified and successful practice of more than a century. Proposals to use economic measures to penalize aggression conflicted with this well entrenched attitude, and such proposals were time after time rejected. During the Senate's consideration of the League of Nations Covenant, the second of the Lodge reservations, prohibiting, among other things, the assumption by the United States of any obligation to employ economic discriminations, was adopted by a decisive vote. That particular reservation was devoted mainly to military sanctions, but the heavy vote by which it was attached to the treaty (56 to 26) may be taken to indicate in a general way Senatorial opposition to economic sanctions. In fact, much of the opposition to the League arose from the realization that its provisions were contrary to our traditional concept of neutrality.

During the 1930's, as aggression broke out in various parts of the world, numerous proposals were made in this country for economic discrimination against the aggressors. In the beginning, effective sentiment was unfavorable to such discrimination. In 1932 a petition was circulated by President Lowell of Harvard and former Secretary of War Newton D. Baker requesting the President and Congress to announce their willingness to concur in any boycott that should be instituted by the League of Nations in the Manchurian controversy. Much opposition existed, however, in Senatorial circles. Paraphrasing King Lear, Senator Borah declared: "That way lies madness." The lack of assurance that the United States would participate in anti-Japanese commercial discriminations was a discouragement to League plans

for economic sanctions against Japan. The framing of various neutrality bills in the middle 1930's brought the question of economic sanctions up for much Congressional discussion. Bias in favor of traditional neutrality on the part of many Congressmen, however, blocked plans to give authority to the President to apply munitions and financial embargoes against aggressors as distinguished from their victims. Accordingly, the Neutrality Acts of the years 1935-1937 contained provisions for embargoes on munitions and loans which would necessarily apply to both sides equally. In 1937 President Roosevelt delivered his famous "quarantine" speech in Chicago. The address was given on October 5, about three months after the war in China had begun. The President suggested the quarantine of aggressors as a method of protecting the peace of the world. Numerous pacifists and isolationists opposed such a policy, and Congressional comment was discouraging to friends of collective security.

Up to this time, as has been shown, the record of the United States was rather consistently against economic sanctions. Nevertheless, some beginnings had already been made by the Administration in its discrimination in favor of China through the nonapplication of the neutrality statutes, in its unequal loan policy which favored China over Japan, and in its tariff discriminations against Germany. These matters will be mentioned later. The stark reality of the growing aggression of Japan and apprehension of the gathering storm in Europe now began to develop widespread sentiment for economic sanctions. Ultimately, the commercial and financial strength of this neutral country was thrown against the aggressors in some respects as strongly as it had been hurled *against our legal enemies during our belligerency in the first World War*. The use of American products by the aggressors in the destruction of their victims convinced a large section of the public that equal economic treatment of belligerents was not rationally consistent with a desire for world order and justice. Perhaps, however, the fear and anger created by ruthless conquest was more important in changing the American attitude than was the force of pure logic. At any rate, by the time the Germans had overrun France in the tragic summer of 1940, the policies of the United States had already begun to shift radically.

The sanctions applied by the United States were of two main kinds: (1) negative or punitive acts directed against the aggressors, and (2) positive or assistance-granting measures aimed at aiding the opponents of aggression. The purposes of the negative sanctions were to shut off American materials and dollars from the aggressor nations and to reduce the funds being used for Axis propaganda in the United States and other neutral countries. The purpose of the positive sanctions¹ was to give the victims and opponents of

¹ The word "sanction" as used in municipal law refers to the punishment and coercion of the law-breaker. Since in international relations the aggressor is put at a disadvantage by aid given to his opponent, the extension of the term "sanction" to include such positive action appears justified.

aggression easier access to American materials. The outline of these policies is as follows:

- I. Negative or punitive sanctions applied against the aggressors:
 1. Moral embargoes.
 2. The withholding of tariff reductions from German commerce.
 3. Countervailing duties.
 4. The licensing of the export of materials essential to national defense and the discriminatory application of the law.
 5. The freezing of funds.
 6. The blacklist.
- II. Positive or assistance-granting sanctions aimed at defeating aggression by aiding its opponents:
 1. The gold purchase policy.
 2. The discriminatory loan policy.
 3. The repeal of the arms embargo.
 4. The Lend-Lease Act.

NEGATIVE OR PUNITIVE MEASURES

Moral Embargoes. The moral embargo, as it was employed in 1938 and 1939, consisted of a mere request from the Department of State to American exporters to stop the shipment of certain kinds of goods; there was no legal prohibition. On June 11, 1938, after heavy loss of civilian life in the Japanese bombardment of Canton, Secretary of State Hull issued a statement that the administration disapproved of the sale of airplanes to countries which had engaged in the bombing of civilian populations. The statement was followed by a letter of July 1 to manufacturers and exporters of airplanes and airplane parts in which the Secretary said that the Department would issue export licenses "with great regret" for shipment to such countries. Over a year later, at the time of Russia's attack upon Finland, further statements were issued. On December 2, 1939, President Roosevelt publicly asked that American manufacturers should bear the government's condemnation of the bombing and machine-gunning of civilians in mind before selling planes or parts to countries obviously guilty of such unprovoked bombing. Elaborating on this declaration, the Department of State addressed a letter to the manufacturers and exporters of munitions, stating that:

. . . the Department hopes that it will not receive any application for a license to authorize the exportation, direct or indirect, of any aircraft, aircraft armament, aircraft engines, aircraft parts, aircraft accessories, aerial bombs or torpedoes to countries the armed forces of which are engaged in such bombing or machine-gunning.²

The moral embargo, so far as it affected Russia, was revoked on January 21, 1941; but it evidently continued to apply to Japan until that country attacked the United States on December 7, 1941. In each of the instances of moral embargo mentioned, the advisory restrictions were intended to

² Department of State Bulletin, Dec. 16, 1939, Vol. I, p. 685.

reduce the power of the aggressor, although the word "aggressor" was not used. Congress had opposed any attempt to name aggressors in foreign wars; but, by designating the aggressive countries as those which bombed civilian populations, the executive used rhetorical tactics to impose what amounted to a sanction against the aggressor states.

Withholding Tariff Reductions from German Commerce. One discrimination against Germany which evidently arose from mixed economic and political motives was that of withholding from imports coming out of Germany the advantages of tariff reductions made under the Trade Agreements Act. According to this Act, the reductions of tariffs made under specific trade agreements (excepting those with Cuba) were to be generalized, that is, to be extended to all countries. The President was authorized, however, to suspend the application of this advantage to articles from any country because of its discriminatory treatment of American commerce, or because of other acts or policies which in his opinion tended to defeat the purposes set forth in the Act. During most of the life of the Act before the entry of the United States into the war, Germany was the only country which was designated by the President for suspension of the tariff reductions. In other words, during the greater part of this time all other countries received the advantage of the tariff reductions while Germany was required to pay the regular duties under the Hawley-Smoot Tariff Act. The reason given for suspension in the case of Germany was that that country did not allocate a fair amount of foreign exchange for the purchase of goods from the United States. How much effect the aggressive political attitudes of Germany and the repugnant Nazi ideology had upon American officials in the inauguration and maintenance of this policy it is difficult to prove, but presumably these influences were considerable.³

Countervailing Duties. Another type of discrimination against the trade of the totalitarian States was the imposition of countervailing duties. The law authorized the imposition of such duties against imports from countries which bestowed bounties upon their exports, and the countervailing duties were presumed to offset the aid given by the governments of the subsidizing countries. The best illustration of the use of this type of discrimination came at the time of the Czechoslovakian crisis in March, 1939. On March 15 Germany annexed Bohemia and Moravia, and the action brought forth intense indignation in the United States. Acting Secretary of State Sumner Welles, on March 17, stated:

This government, founded upon and dedicated to the principles of human liberty and of democracy, cannot refrain from making known this country's condemnation of the acts which have resulted in the temporary extinguishment of the liberties of a free and independent

³ Other countries which discriminated against the United States in the allocation of exchange, such as Argentina, were not placed upon the disfavored list, although for a time Australia suffered from this penalty.

people with whom, from the day when the Republic of Czechoslovakia attained its independence, the people of the United States have maintained specially close and friendly relations.

It is manifest that acts of wanton lawlessness and of arbitrary force are threatening world peace and the very structure of modern civilization.⁴

The next day the Treasury Department gave notice of the application of a 25% rate of countervailing duties against goods coming from Germany, which, added to the higher duties Germany was already paying, constituted quite an obstacle to German sales in this country. It became increasingly difficult for Germany to find through exports to the United States the foreign exchange with which to purchase the vast amount of materials necessary for her armament program. The reason given by the Treasury Department was that Germany, through the barter system, was paying what amounted to bounties upon exports to the United States.⁵ The coincidence in time between the Treasury action and the strong official condemnation of Germany for the rape of Czechoslovakia, however, gave to the discrimination the appearance and force of a rebuff against an aggressor. In July of the same year the United States imposed countervailing duties on certain silk imports from Italy. Altogether a marked distinction was made between the aggressor totalitarian States and the democratic countries in the application of these penalties by the United States.⁶

The Licensing of Exports of Materials Essential to National Defense and the Discriminatory Application of the Law. Drastic trade discrimination against Japan was prevented by the commercial treaty of 1911 with that country.⁷ Under the treaty, the United States agreed not to place prohibitions upon imports from or exports to Japan which did not equally extend to the like articles imported to or exported from any other country. On July 26, 1939, in accordance with the termination clause in the compact, the United States gave a six months' notice of withdrawal from the treaty. The termination became effective as of January 26, 1940, and constituted in itself something of a diplomatic rebuke or sanction. Several months later, on July 2, 1940, the President signed the Export Control Act which granted him the power to list any materials which he should decide to be essential to our national defense. The export of such materials was placed under a license system, and the President was given the power to prevent exportation entirely should he

⁴ Department of State, Press Releases, March 18, 1939, pp. 199-200.

⁵ *Ibid.*, p. 203.

⁶ Margaret S. Gordon, *Barriers to World Trade* (Macmillan, New York, 1941), p. 408, note 51.

⁷ It has been argued that, on principles of reprisal, economic discriminations were permissible, because of Japan's violation of various treaties, in spite of the commercial convention of 1911. See Q. Wright, "The Legal Status of Economic Sanctions," *Amerasia*, February, 1939, p. 569.

believe such a step necessary. On July 31 an order was announced which prevented the export of aviation gasoline except to countries in the Western Hemisphere and to other places where such gasoline was necessary for the operation of American-owned companies. The order was principally intended to prevent the shipment of this important military material to Japan. About two months later the export of iron and steel scrap was restricted to the countries of the Western Hemisphere and Great Britain.⁸ Thus Japan was deprived of some of its most important steel-making materials. In cases of various other articles, greater facilities were provided for the issuance of licenses to Western Hemisphere and British companies than to those of Japan.

The Freezing of Funds. In his authority to control financial transactions and thus to freeze the funds of aliens, the President possessed power for a much more sweeping sanction than any yet mentioned. The authority for such action was derived from the Trading with the Enemy Act of 1917 as amended in 1933 to meet the requirements of a national emergency. Section 5 (b) of the Act gives the President a comprehensive authority over business transactions involving the regulation by executive order of banking, exchange, and dealings in securities.

This power, which made it possible to prevent resources within the United States from being used by the aggressors, was one of the most notable of the "methods short of war" employed against the Axis during and after the summer of 1940. As the Germans marched into one country after another, the President issued orders placing under a strict license system all financial dealings in this country conducted on behalf of nationals of the occupied countries. The freezing orders prohibited within the United States on the part of such persons the following acts except as they might be authorized by license: the transfer of credit between banks, the payment of funds by or to a bank, transactions in foreign exchange, and dealings in evidences of debt. By these means the President was able to prevent the use of such financial resources in the United States as might pass to the ownership or control of the conquerors.

The list of freezing orders followed the route of the German military machine through Denmark, Norway, The Netherlands, Belgium, Luxemburg, France, Rumania, Bulgaria, Hungary, Yugoslavia, and Greece. It also included Latvia, Estonia, and Lithuania, which were occupied by Russia. Finally, on June 14, 1941, all of Europe was covered, thus placing the nationals and property of Germany and Italy under the restrictive system.⁹ With regard to certain European countries, Finland, Portugal, Spain, Sweden, Switzerland, and the U.S.S.R., which were not a part of the German-

⁸ For the various orders see Department of State Bulletin, July 6, 1940, Vol. III, p. 11; Aug. 3, 1940, Vol. III, p. 94; Sept. 28, 1940, Vol. III, p. 250.

⁹ Department of State Bulletin, June 14, 1941, Vol. IV, p. 718; 6 Federal Register, 2897 (Ex. Order 8785).

Italian order, general licenses could be issued to permit dealings upon adequate assurances that economic aid would not go to the Axis. The effects of the freezing orders upon the Axis were described in an official American publication as follows:

The freezing of assets paralyzed German and Italian efforts to acquire vital and strategic materials in the Western Hemisphere. The Axis was using American dollars and American banking facilities to underwrite sabotage, spying, and a propaganda campaign in both North and South America. The blocking of Axis assets abruptly choked this poisonous stream.¹⁰

The Japanese became subject to the freezing control on July 25, 1941, following the invasion of the southern ports of French Indo-China by Nipponese troops.¹¹ The blow to Japan was even more telling than that dealt to Germany and Italy. The starvation of Japan's war machine, so dependent upon imports, produced a feeling of desperation among the Japanese militarists and doubtless had much to do with causing the suicidal attack of December, 1941, upon the United States. The freezing order probably helped to involve this country in war, but such is the risk of withdrawing the assistance of American finance and industry to an international criminal.

The Blacklist. Another method for blocking the flow of resources to the Axis was the blacklisting of trading firms in foreign countries which were presumed to be acting for the benefit of Germany and Italy. On July 17, 1941, a list of over 1,800 persons and firms doing business in the Latin American Republics was proclaimed. Business establishments on this list were prohibited from receiving from the United States any articles covered by the Export Control Act except under special circumstances. They were also regarded as nationals of Germany or Italy and were thus subjected to the prohibitions of the freezing order of June 14, 1941.¹² The Department of State explained that the order was intended to deny the benefits of inter-American trade to persons who had been using commercial profits to finance subversive activities.¹³ The effect of the blacklist was to drive many German and German-sympathizing firms out of business in Latin America and thus to deprive the Axis of useful commercial and ideological agencies.

POSITIVE OR ASSISTANCE-GRANTING MEASURES

There remain to be considered certain other acts in which this country departed from impartial neutrality in order to grant aid to the victims and opponents of aggression. One policy which will not be considered in detail

¹⁰ Office of Facts and Figures, Report to the Nation (Washington, 1942), p. 23.

¹¹ Department of State Bulletin, July 26, 1941, Vol. V, p. 73; 6 Federal Register, 3715 (Ex. Order 8832).

¹² *Ibid.*, July 19, 1941, Vol. V, p. 41. Many other names were added to the list by subsequent proclamations.

¹³ *Ibid.*, Aug. 2, 1941, Vol. V, p. 99.

but which might be regarded as discriminatory aid was the failure to apply the Neutrality Act in the case of the Sino-Japanese War which began in 1937. The Act was intended to be applied whenever the President should find that a state of war existed abroad. Although the Sino-Japanese War was and is one of the most destructive in modern history, the chief executive never found that a state of war existed in China until the Japanese attack upon Pearl Harbor merged the Asiatic and European conflicts into one great world war. The purpose of the oversight was to aid China. Had the President recognized the state of war, munitions shipments to the belligerents would have been stopped; and such a break in commerce would have been to the distinct disadvantage of China. Japan had large munitions industries while China did not. The effect of applying the Act would have been to deprive China of something she could not otherwise get and to take from Japan merely the right to import something she already had. The nonapplication of the Act was in line with Chinese interests and desires and is to be contrasted with the prompt application of the law in the Italo-Ethiopian War, in which case the effect of the Act was to hinder Italy.

The Gold Purchase Policy. The program of purchasing gold freely at \$35 per ounce had an important effect in stimulating American exports to Great Britain and (before June, 1940) to France. A great deal of the British imports from the United States, which were in excess of British exports to this country, were paid for by the shipment of gold. Had the United States not been willing to buy the gold, the British would have found it difficult to have obtained needed American supplies on a large scale. An American student of financial policy stated in 1941 that the purchase at a high price of all gold offered was the most important "aid-short-of-war" rendered the British by neutral America.¹⁴

The Discriminatory Loan Policy. Loans to the victims of aggression have been closely connected with the export of merchandise to such countries. In this connection, their purpose has been to give buying power to the favored borrower or to protect its currency against the strain of heavy buying. While the loan policy is classified here as a positive program of aiding the victim, loans might logically have been mentioned also under negative sanctions, since they were tacitly forbidden to the aggressors. The policy goes back beyond the main period of our discussion. Japan particularly was barred from financial aid in the United States after the Manchurian aggression of 1931 by a governmental attitude which was effective even if it did not receive official expression.

The Reconstruction Finance Corporation and the Export-Import Bank of Washington were the chief institutions by which financial aid to victims of aggression was extended. Credits totalling \$171,500,000 were granted China to aid her in buying necessary commodities in the decade from 1931 to

¹⁴ Charles R. Whittlesey, "Gold Policy and Foreign Policy," *The New Republic*, June 30, 1941, p. 879.

1941.¹⁵ With these China purchased wheat, cotton, locomotives, motor trucks, oil, and other supplies. The loans were contrary to Japanese desires and created indignation in Japan. After the Russian invasion of Finland in November, 1939, the Export-Import Bank extended \$35,000,000 in credits to cover the export of supplies to the invaded country.¹⁶

The loans to China and Finland were partisan acts of sympathy to victims of attack. They were not consistent with the principles of neutrality, which forbid a neutral *government* to make loans to belligerents.¹⁷

The Repeal of the Arms Embargo. When, after the Munich conference of 1938, a European conflict appeared probable, it became clear that the bilateral munitions embargo of the American neutrality laws would, in such a contingency, operate to the extreme disadvantage of Great Britain and France. In July, 1939, President Roosevelt sent a special message to Congress appending a statement of Secretary of State Hull to the effect that the provision for the munitions embargo was contrary to the interests of the peace-loving nations.¹⁸ Shortly after the war began, the President reëmphazized the former appeal. Congress then passed the repeal provision; and the ban was lifted on November 4, 1939. This action, taken after war had begun, permitted American munitions to flow in a flood to the Allies and unquestionably showed favoritism of a very substantial character.

The Lend-Lease Act. Probably the most important single type of economic sanction employed by the United States in our recent neutrality period was the furnishing of supplies to the opponents of aggression under the Lend-Lease Act. This measure, passed in March, 1941, authorized the chief executive to manufacture or otherwise procure "defense articles" for any government "whose defense the President deems vital to the defense of the United States." The President was to be the sole judge of the terms, and he could regard as a satisfactory *quid pro quo* any direct or indirect benefit rendered to the United States.

The basis for extending this unusual aid was fear of the powerful aggressors and of the calamities which their lawlessness might bring down upon the United States. As Secretary Hull remarked in support of the bill before the House Committee on Foreign Affairs:

¹⁵ The items making the total are R.F.C. credits of \$50,000,000 in 1933, and Export-Import Bank credits of \$1,500,000 in 1937, \$25,000,000 in 1938, \$20,000,000 in March, 1940, \$25,000,000 in October, 1940, and \$50,000,000 in November, 1940. These are the sums of the authorizations of credit. In some cases, particularly the earlier ones, the credits were not fully used.

¹⁶ Three credits were announced in the following sums: \$10,000,000 in December, 1939, \$20,000,000 in March, 1940, and \$5,000,000 in March, 1941. The information regarding the Chinese and Finnish credits is found in Export-Import Bank of Washington, Statement of Loans and Commitments, June 30, 1941.

¹⁷ China may well be defined as a belligerent in fact after July, 1937, although war was not formally declared. Governmental loans to China under these circumstances cannot, in a realistic sense, be regarded as consistent with the spirit of impartial neutrality.

¹⁸ Department of State Bulletin, July 15, 1939, Vol. I, p. 45.

We are amply warranted, as a measure of self-defense and in the protection of our security, to allow supplies to go to the countries who are directly defending themselves and indirectly defending us against the onrush of this unholy determination to conquer and dominate by force of arms. We are merely trying to protect ourselves against a situation which is not of our making and for the prevention of which we exerted our every energy.¹⁹

The Act was accompanied by an appropriation of \$7,000,000,000, and seven months later another appropriation of almost \$6,000,000,000 was added. By the time this country entered the war, the aid provided under the Act was being disbursed on a large scale. By the end of the year 1941, \$1,200,000,000 had been spent. Exports to the value of approximately \$600,000,000 had been sent abroad; and the balance of the disbursements had provided for such services to friendly governments as the conduct of training programs in the United States, the repair of ships, and the construction of munitions plants.²⁰

It can thus be seen that, previous to Pearl Harbor, the United States had built up precedents of economic sanctions against aggression. Altogether the purposes of the sanctions were to prevent American supplies and dollars from reaching the aggressor nations, to shut off funds used for Axis propaganda in the United States and other neutral countries, and to make American supplies more easily available to the opponents and victims of aggression. The adoption of sanctions was not due to any one decision but came in a variety of ways over a period of several years. The policy represented a persistent course on the part of the executive; and, at times, the President was supported by Congressional action, as in the case of the repeal of the arms embargo and the passing of the Lend-Lease Act. The coming of sanctions was in no sense due to an accidental decision or one made under the spur of a single emotional appeal.

How far the United States drew away from traditional neutrality during this period can be seen from the fact that, with regard to two types of sanctions, the freezing of funds and the blacklist, the precedents for action came from the period of our belligerency in 1917-1918 and were originally aimed at our legal enemies. In fact, while the United States was a neutral in the first World War, it had protested the use of the blacklist even when used by a belligerent.²¹ In another instance, that of the Lend-Lease Act, the neutral American Government gave more generous terms in 1941 in extending aid to opponents of aggression than the belligerent American Government had given its allies in 1917 and 1918. Our neutral period of 1939-1941 was in some respects more akin to belligerency than neutrality.

¹⁹ Department of State Bulletin, January 18, 1941, Vol. IV, p. 91.

²⁰ Office of Facts and Figures, *op. cit.*, p. 17.

²¹ "It is manifestly out of the question that the government of the United States should acquiesce in such methods or applications of punishment to its citizens." Foreign Relations of the United States, 1916 (Supplement), p. 422.

The measures taken by the United States were not, it is true, entered into in accordance with the written plan of a formal international organization. They were the individual actions of one country, taken on its own volition. However, in these actions we may see in formation something stronger, though slower to develop, than written contract—the shaping of international mores, perhaps later to be transferred into positive law. In applying sanctions, the United States acted in accordance with a general, though unorganized, consensus of world opinion against law-breakers. Americans were motivated most strongly by fear for their national safety, the emotion that is the chief basis of the movement for collective security. And these incidents have set a precedent in American foreign policy which should make the solution of the mutual security problem easier after this war.

A nation is bound, to a certain extent, by its past. In 1919 and 1920, when the United States contemplated the change from the law of impartial neutrality, deeply imbedded in American practice, to the unneutral policy of aiding one set of belligerents as against another, the difficulties of making the transition were great. At the end of the present war the United States will be looking back upon a radically different set of precedents regarding neutrality than those which were remembered in 1919. When terms of world organization are considered, it would appear that economic sanctions should meet with much less American opposition than formerly, since they have already had an important place in our policy. And the prospect that the vast economic power of our country may not be used to support aggressor nations but rather to defeat them should make the task of providing an effective international organization appreciably lighter.

... settlement of which
... in a situation is the greatest
... employment of force, although force
... as ... forbidden by a special treaty. The
complete failure of the Kellogg Pact clearly shows that it is useless to out-
law war without eliminating the possibility of legally unsettled and un-
settled conflicts. To maintain this dangerous possibility is the true
function of the distinction between legal and political conflicts.

VI

Compulsory jurisdiction of an international court does not exclude a
procedure of conciliation. When the parties agree, the conflict may first
be submitted to a commission of conciliation. Then the court becomes
competent only in the event of failure of conciliation. This is provided by
Article 20 of the General Act for the Pacific Settlement of International
Disputes of 1928. The General Act submits also political disputes to
judicial decision (Articles 21-28). But this progress is completely neu-
tralized by the stipulation of Article 39, which allows the States to make
their acceptance of the General Act conditional upon reservations. Among
these reservations admitted by the General Act, the most problematical
one is that referring to "questions which by international law are solely
within the domestic jurisdiction of States." This is the well known formula
of Article 15, § 8, of the Covenant of the League of Nations, a formula
which is very much discussed. There are no questions which, by their
very nature, are "solely within the domestic jurisdiction" of a State. Any
matter may become the object of an international treaty and thus cease to
be solely within the domestic jurisdiction of the contracting States. A
matter is "solely" within the domestic jurisdiction of a State only as long
as it is not subject to a norm of customary or conventional international
law. But this does not mean that such a matter cannot be the cause of
an international conflict or that international law cannot be applied to
such a conflict. That a dispute between States is out of a matter
which "by international law is solely within the domestic jurisdiction" of
one of the parties means only that the international law does not
obligate that party to do anything. Consequently that the

an international court.

To the question as to what right with compulsory jurisdiction, we find, at least in principle, a satisfactory answer in Article 38 of the Statute of the Permanent Court of International Justice: in the first place, international treaties referring to the case in question; in the second place, customary international law. If the court is entitled to apply also the general principles of law recognized by civilized nations, it has a great opportunity to adapt positive international law to the particular circumstances of a concrete case according to the demands of justice and equity. This, practically, implies the power to decide a case *ex aequo et bono*, although such a decision is, according to Article 38, permissible only if the parties agree thereto. A decision *ex aequo et bono* is based on equity, and equity is a general principle of law recognized at least by the Anglo-Saxon nations.

The question as to what should be the rules applicable to the decision of so-called political disputes is generally considered very crucial. If only one party bases its claim or defense on principles other than those of positive international law, it is hardly justifiable to authorize the court expressly not to apply positive international law, and thus to deprive the party which conforms in its conduct to the law and relies on it, of this law's protection. Such an express authorization of the court to apply principles other than those of law is justifiable only if both parties base their attitude on such principles or, as Article 38 stipulates, if both parties agree to a decision *ex aequo et bono*. However, the importance of this question is highly overestimated. If the court is entitled to apply the general principles of law recognized by civilized nations, it has, as pointed out, practically the power to decide the case *ex aequo et bono*. (A court which really has compulsory jurisdiction, that is to say, which is competent to decide finally all disputes without any exception, inevitably will adapt positive law in its concrete decisions gradually and perceptibly to actual needs; in other words, will decide on the basis of equity.) A court which is expressly empowered to apply

¹ Allied Resolution on German War Crimes, *United Nations Monthly Bulletin*, Jan. 15, 1942, Vol. II, No. 1, p. 2, and Allied Conference on German War Crimes, *United Nations Monthly Bulletin*, Jan. 15, 1942, Vol. II, No. 2, p. 32. The signatory governments represented were Belgium, Canada, Czechoslovakia, Greece, Luxembourg, The Netherlands, Norway, Poland, Portugal, and the United Kingdom. The United States, Great Britain, and the Soviet Union were not signatories to the agreement. The United States, Great Britain, and the Soviet Union were not signatories to the agreement. The United States, Great Britain, and the Soviet Union were not signatories to the agreement. See Geo. A. F. *et al.*, *United Nations Monthly Bulletin*, Vol. 37 (1943), pp. 84-86.

relating to the treatment of prisoners of war stipulates that "in the extreme case of war, it will be the duty of every Power" to respect its provisions under all circumstances.² Individuals, therefore, cannot be held internationally liable for their acts contrary to the law of war. This result is formally expressed in Article 3 of the Fourth Hague Convention of 1907 concerning the Laws and Customs of Land Warfare. In providing that a contracting party, when belligerent, "shall be responsible for all acts committed by persons forming part of its armed forces" this article sanctions the traditional principle of the sole responsibility of the State for international wrongs as a necessary corollary of the proposition that individuals are not subjects of the law of war.³

(2) *Absence of international war crimes.* The characterization of criminal acts of violence committed by individuals in contravention of the rules of warfare as municipal penal offenses is affirmed, secondly, by the nonexistence of international war crimes chargeable either to the collectivity of persons forming a nation or to its members individually. Neither the Fourth Hague Convention of 1907 and the regulations annexed to it nor other generally accepted international agreements regulating the conduct of warfare designate the penal sanctions which could be applied to States or individuals for their acts contrary to the law of war.⁴ Article 3 of the Fourth Hague Convention of 1907, however, expressly provides for the payment of compensation by the belligerent violating its provisions. This stipulation, moreover, applies to the infraction of any generally recognized rule of the laws of war. Existing international arrangements on the conduct of hostilities provide thus only for the civil responsibility of nations for breaches of the laws and customs of war committed by them or by their members acting in their behalf. Consequently, neither individual nor State can incur a criminal liability under the international law of war.⁵

(3) *Criminal acts of violence contrary to the rules of warfare to be punished by States.* The third and principal reason for the characterization of penal offenses against the laws of war as municipal law crimes is that, in the absence of international authority, international conventions on the conduct of warfare as a rule make it the duty of States to transform or incorporate their provisions into national regulations and to enforce the latter against

² Preamble, this JOURNAL, Supp., Vol. 27 (1933), p. 60.

³ *Ibid.*, Vol. 2 (1908), p. 93. Cf. also Q. Wright, "The Outlawry of War," this JOURNAL, Vol. 19 (1925), p. 80.

⁴ Cf. A. Pillet, "La guerre actuelle et le droit des gens," 23 *Revue générale de droit international public* (hereafter cited as *R.G.D.I.P.*) (1916), pp. 203 ff., 238; Chas. de Visscher, "Les lois de la guerre et le droit international public," 24 *ibid.* (1917), p. 84 ff.; Sir John Fischer Williams, *Charters of International Law and the League of Nations* (1929), pp. 64 ff., 322 ff.

⁵ Cf. also Q. Wright, "The Outlawry of War," this JOURNAL, Vol. 19 (1925), p. 80; and "The League of Nations in the Twentieth Century," this JOURNAL, Vol. 27 (1933), p. 60; and *International Law* (5th ed. by Lauterpacht),

the persons subject to their control.⁶ Moreover, in so charging nations with the enforcement of the law of war against individuals, international agreements either permit or oblige States to define and sanction municipally the offenses which constitute crimes against the laws and customs of war. The Hague and other multilateral arrangements concerning warfare, for example, leave it to the discretion of the signatory Powers to repress by disciplinary or punitive measures all individual conduct contrary to their provisions, although some of the articles of the Hague Regulations might be construed as requiring municipal law to punish criminally the hostile conduct outlawed by them and generally condemned as military or common law crimes.⁷ On the other hand, the Red Cross Conventions expressly oblige the parties to impose criminal sanctions upon infractions of their rules perpetrated by individuals in time of war.⁸ In the past, States generally have complied with these obligations and exercised the power of punishment conferred upon them. In transforming the laws and customs of war into national regulations they have, in general, defined the acts considered by them criminal offenses against the rules of warfare and attached to wrongs so defined or recognized by municipal legislation the penal sanctions applicable to individuals charged with the commission of criminal acts contrary to the laws of war. For this reason, acts of violence committed by individuals, if criminal in nature and not in conformity with the rules of warfare, are penal offenses under municipal law rendering their perpetrators personally responsible and liable to prosecution and punishment under the national legislation of the belligerent States.⁹

⁶ See, e.g., Art. 1 of the Hague Land Warfare Conventions of 1899 and 1907, this JOURNAL, Supp., Vol. 1 (1907), p. 132, and Vol. 2 (1908), p. 92; Arts. 27-29 of the Red Cross Convention of 1929, *ibid.*, Vol. 27 (1933), p. 54 ff.; and Arts. 82, 84 and 85 of the Convention of 1929 relating to the Treatment of Prisoners of War, *ibid.*, p. 83 ff.

⁷ See, e.g., Arts. 23, 28, 46 and 47 of the Hague Regulations of 1907, this JOURNAL, Supp., Vol. 2 (1908), p. 106 ff. Cf. also A. Mérignhac, "Les théories du Grand État-Major allemand sur les 'Lois de la guerre continentale' mises en regard de la doctrine, de la pratique des divers États et des décisions de la Conférence de la Haye de 1899," 14 R.G.D.I. (1907), p. 223 ff.; J. Dumas, "Les sanctions du droit international d'après les Conventions de la Haye de 1899 et de 1907," 15 *ibid.* (1908), p. 557 ff.; E. Colby, "War Crimes," 23 Mich. Law Rev. (1925), p. 489 ff.

⁸ See Art. 28 of the Red Cross Convention of 1906, this JOURNAL, Supp., Vol. 1 (1907), p. 207; Art. 29 of the similar convention of 1929, *ibid.*, Vol. 27 (1933), p. 55; and Art. 21 of the Tenth Hague Convention of 1907 concerning the Adaptation of the Principles of the Geneva Convention to Maritime Warfare, *ibid.*, Vol. 2 (1908), p. 163. For the argument that Art. 28 of the Red Cross Convention of 1906 obliges States to punish criminally *all* infractions of the laws of war, see Renault, "De l'application du droit pénal aux faits de guerre," 25 R.G.D.I. (1918), p. 12 ff., and Mérignhac, "De la sanction des infractions au droit des gens commises, au cours de la guerre européenne; par les empires du centre," 22 *ibid.* (1917), p. 28 ff. *Contra*, P. Pic, "Violation systématique des lois de la guerre par les Austro-Allemands. Les sanctions nécessaires," 23 *ibid.* (1916), p. 265 ff.

⁹ See, e.g., British Manual of Military Law, War Office, London: 1914 [reprinted 1929 with the warning that it is partly obsolete], Ch. XIV, Arts. 441-450, p. 302 ff., especially Arts.

This conclusion with regard to the legal nature of war crimes would seem to apply also to Article 26 of the Hague Regulations of 1907, although Professor Kelsen remarks that under this provision commanders in the field incur a secondary international liability for their acts contrary to it which, he holds, exposes them to international sanctions.¹⁰ Article 26, like other stipulations of the Hague Regulations, does not attach any penalty whatever to the norm contained in it. The municipal character of criminal offenses against these regulations and other rules of warfare, moreover, was generally conceded in the literature on war crimes during and immediately after the last world conflict.¹¹ Even where it was contended that incorporation of international law into national regulations does not change the legal nature of the norms applicable to acts in contravention of the rules of warfare, it was not denied that, in the absence of international penal legislation and of an international criminal court, prosecution and punishment of criminal breaches of the laws and customs of war actually take place under standards and rules of municipal law.¹²

(4) *Proposals to create international war crimes.* Although a few official attempts have been made in the recent past to create international war crimes chargeable to members of armed forces generally or to heads of States only, they have not changed the legal nature of penal offenses against the law of war. In 1874, for example, the French delegate, General Arnadeau, suggested to the Brussels Conference that it implement with criminal sanctions the draft convention on the rules of land warfare discussed there, so that this agreement could serve as "a common penal code for crimes, delicts, or offenses committed in violation of the laws of war." The Powers, he continued, would thereby be obliged "to embody in their codes analogous penalties" enabling them to prosecute criminally any act of violence perpetrated by members of armed forces in neutral or enemy territory con-

445, 450, pp. 303, 304; U. S. Rules of Land Warfare, War Department, Washington: 1940, Foreword, p. iii ff., and Ch. 11; Pars. 345-359, pp. 86-90, especially Par. 357, p. 89. Cf. also A. B. Keith, *Wheaton's Elements of International Law*, 6th English ed., Vol. II (1929), p. 711; A. von Verdross, *Völkerrecht* (1937), p. 290 ff.; Renault, *loc. cit.*, p. 13 ff.; R. Frank, "Strafrecht und Völkerrecht," III *Wörterbuch des Völkerrechts und der Diplomatie* (hereafter cited as *Wörterbuch*) (1929), p. 1087 ff.

¹⁰ "Théorie générale du droit international public," 42 *Recueil des Cours de l'Académie de Droit International de la Haye* (hereafter cited as *Hague Recueil*) (1932), p. 154.

¹¹ See, e.g., J. W. Garner, "Punishment of Offenders against the Laws and Customs of War," this JOURNAL, Vol. 14 (1920), p. 73, and the French writers cited there; S. S. Gregory, "Criminal Responsibility of Sovereigns for Willful Violations of the Laws of War," 6 *Virg. Law Rev.* (1919), p. 402 ff.; Colby, "War Crimes and Their Punishment," 8 *Minn. Law Rev.* (1923), p. 40 ff.; Verdross, "Kriegsverbrechen und Kriegsverbrecher," I *Wörterbuch* (1924), p. 775 ff.

¹² See, e.g., H. H. L. Bellot, "War Crimes and War Criminals," 36 *Canad. Law Times* (1916), p. 757 ff.; C. A. Hereshoff Bartlett, "Liability for Official War Crimes," 35 *Law Quart. Rev.* (1919), p. 181; Sir Frederick Pollock, "The Work of the League of Nations," *ibid.*, p. 195 ff.

trary to the provisions of the proposed treaty.¹³ Although the private Institute of International Law in 1880 adopted General Arnadeau's proposal in a modified form, neither the Brussels draft convention nor subsequent agreements dealing with the law of land warfare have created this suggested international criminal code.¹⁴ The only multilateral conventions now in force which approximate the object of this suggestion are the Red Cross Conventions. As noted, they stipulate in part that the signatory Powers in time of war shall repress by penal measures all acts committed by individuals in contravention of their particular rules. These treaties, however, do not themselves attach such criminal sanctions to their substantive provisions nor create a general international penal code. They do not, therefore, recognize a personal penal responsibility of the members of the armed services of a country for criminal acts of violence perpetrated by them contrary to the laws and customs of war.¹⁵

Similar nonrecognition has been accorded in the past practice of nations to the suggestion that heads of States be held personally responsible for acts of war committed by their countries' armed services contrary to international law. In 1918, for instance, the Law Officers of the Crown suggested to the Imperial War Cabinet that rulers of nations and their subjects were personally responsible and liable to penal punishment for criminal violations of the law of nations, and added that acts such as breach of neutrality treaties or unrestricted submarine warfare should pass as crimes into a future international penal law. This suggestion subsequently had the support of the British, French and Italian delegates at Versailles.¹⁶ Consequently, the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties of the Paris Peace Conference of 1919 proposed, *inter alia*, "that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law" as acts provocative of war and accompanying its inception.¹⁷ However, as a result largely of American and Japanese objections, this recommendation never became law although the contrary has been maintained.¹⁸ Instead of recognizing that

¹³ *Fontes Juris Gentium*, Ser. B. Sec. I. Tom. II. Pars 1 (1937), p. 61, and Pars 3 (1938), pp. 92 ff., 117 ff. [Translations here and elsewhere are the writer's.]

¹⁴ See J. B. Scott, *Resolutions of the Institute of International Law* (1916), pp. 11 ff., 41 ff., for Art. 84 of the Oxford Manual of the Laws and Customs of War on Land and its motivation. Cf. also, *e.g.*, H. La Fontaine, "International Law and War," 3 *Am. Bar Assoc. Jr.* (1917), p. 167, and G. G. Phillimore, "Laws of War," 5 *Jr. of Comp. Legisl. and Intl. Law* (1923), p. 290 ff., for similar recent proposals.

¹⁵ *Supra*, n. 8.

¹⁶ See David Lloyd George, *Memoirs of the Peace Conference* (1939), Vol. I, pp. 56, 59-64, 66.

¹⁷ Report of this commission (hereafter referred to as the Commission on Responsibilities), this *JOURNAL*, Vol. 14 (1920), p. 120.

¹⁸ Cf. Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities (hereafter cited as American Memorandum), *ibid.*, p. 135 ff., and Reservations by the Japanese Delegation (hereafter cited as Japanese Reservations), *ibid.*, p. 151 ff.

acts of aggression are international penal offenses chargeable to heads of States, instead of making such acts international crimes henceforth chargeable to individuals, the Peace Conference in Article 227 of the Treaty of Versailles merely characterized particular acts of aggression as moral or political offenses for which a particular ruler should be punished as if for penal offenses against the law of nations.¹⁹ This attempt, moreover, proved abortive, and the Powers subsequently failed to create such quasi-international crimes chargeable to rulers or, for that matter, to persons holding responsible positions in the State. Neither the provisions of the Covenant of the League of Nations designed to maintain peace by delaying the resort to arms, nor those of the Kellogg Pact of 1928 and of other postwar instruments for the outlawry of war, were implemented with criminal sanctions applicable to the persons who might be deemed responsible for acts provocative of war or for the crime of having waged war in violation of these agreements.²⁰

(5) *Acts connected with unrestricted submarine warfare.* It has been maintained, however, that Article 3 of the Washington Treaty of February 6, 1922, relating to the use of submarines and noxious gases in warfare, established an exception to the general practice of treating offenses contrary to the rules of warfare as municipal law crimes in that it assimilates acts connected with unrestricted submarine warfare to piracy *jure gentium* and thereby characterizes such acts as international penal offenses. This view rests partly upon the construction of piracy as a crime against the law of nations and partly upon the fact that the treaty itself designates the sanction to be imposed by States upon an act contrary to its rules.²¹

It appears, however, that piracy does not constitute an offense against the law of nations. Courts, including our own and British tribunals, have construed piracy as a crime of municipal law.²² It follows that the offenses out-

¹⁹ See Art. 227, this JOURNAL, Supp., Vol. 13 (1919), p. 250. For the construction of this article as recognizing or creating an international crime, see, e.g., L. Le Fur, "Guerre Juste et Juste Paix," 26 R.G.D.I. (1919), p. 377; Q. Wright, "The Legal Liability of the Kaiser," 13 Am. Pol. Sci. Rev. (1919), p. 126 ff. For the contrary view, see, e.g., P. Fauchille, "La guerre de l'avenir et les moyens de l'empêcher," 26 R.G.D.I. (1919), p. 416 ff.; J. B. Scott, "The Trial of the Kaiser," in *What Really Happened at Paris* (1921), p. 237 ff.; C. G. Fenwick, *International Law*, 2nd ed. (1934), pp. 242 ff., 582 ff. Cf. also Report of the Commission on Responsibilities, *loc. cit.*, pp. 118-120; Lloyd George, *op. cit.*, I, p. 57.

²⁰ Cf., e.g., Williams, "Sanctions under the Covenant," 17 *British Yearbook of International Law* (hereafter cited as B.Y.I.L.) (1936), pp. 130-149; A. K. Kuhn, "The Execution of Hostages," this JOURNAL, Vol. 36 (1942), p. 274. For the contrary view, see, e.g., H. Wehberg, "Le Protocole de Genève," 7 *Hague Recueil* (1925), pp. 30 ff., 35 ff.; same, "Le problème de la mise de la guerre hors la loi," 24 *ibid.* (1928), p. 257 ff.; N. Politis, *Nouvelles Tendances du Droit International* (1927), p. 127 ff. For comment on these latter constructions, see C. Schmitt, *Die Wendung zum Diskriminierenden Kriegsbegriff* (1938), *passim*.

²¹ For Art. 3 of the Washington Treaty, see this JOURNAL, Supp., Vol. 16 (1922), p. 58 ff. For the construction stated above, see, e.g., Kelsen, *loc. cit.*, pp. 151-153; Politis, *op. cit.*, p. 98; J. Spiropoulos, "L'individu et le droit international," 30 *Hague Recueil* (1929), p. 231 ff., and cf. C. Eagleton, *Responsibility of States in International Law* (1928), p. 40 ff.

²² The Harvard Research in International Law, Part IV, Piracy (1932), states (p. 757):

lawed by the Washington Treaty would constitute penal offenses against municipal law, not against the law of nations.

But even if piracy were to constitute an offense against international law, it does not follow that acts connected with unrestricted submarine warfare likewise are international crimes. There was no prior customary rule of the law of nations on this subject. Since the Washington Treaty never came into force, and since subsequent naval agreements do not contain a rule similar to its Article 3, it may be presumed that the acts in question are not now international crimes even if the rule condemning them as if piratical offenses was "to be deemed an established part of international law."²³

If the treaty had come into force, moreover, it does not necessarily follow that the acts connected with unrestricted submarine warfare henceforth were to be international crimes simply because the Powers designated the sanction which should be attached to this type of offense. The treaty still required the recognition and punishment of the acts in question as crimes by the municipal law of States. It did not *ipso facto* establish municipal penal offenses, much less an international crime. It would seem, rather, that in condemning the acts in question as offenses to be deemed contrary to the rules of warfare and in making them punishable as if piratical crimes, the Washington Treaty Powers apparently intended to add these acts to wrongs customarily punishable as municipal penal offenses and to subject them to universal repression by States.²⁴

The conclusion that acts connected with unrestricted submarine warfare were not to be considered international penal offenses even if the Washington Treaty had come into force would not seem to be invalidated by the fact that in the Nyon Agreements of September 14 and 17, 1937, nine Powers adapted the Washington Treaty rule to the particular circumstances of the Spanish Civil War and, incidentally, extended its application to air warfare.²⁵ On the contrary, the signatories of these arrangements seemed to look upon treaty offenses as municipal law crimes. They specified this con-

"... pirates are not criminals by the law of nations," basing this view on general practice, and the Judicial Committee of the Privy Council, agreeing with this statement, held in *In re Piracy Jure Gentium*, [1934] A. C. 586, that "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country."

²³ See Naval War College, *International Law Situations 1930* (1931), p. 27; G. G. Wilson, "The Submarine and Place of Safety," this JOURNAL, Vol. 35 (1941), p. 496 ff. Cf. also Message of President Roosevelt to the Congress of the United States on the occasion of the sinking of the *Robin Moor*. Congressional Record, June 20, 1941, Vol. 87, p. 5499 ff.

²⁴ Cf. Verdross, *Völkerrecht*, p. 67 ff.; Keith, *op. cit.*, II, p. 1150 ff.; Spiropoulos, *Théorie Générale du Droit International* (1930), p. 204; Wilson, in Naval War College, *op. cit.*, p. 25 ff.; (Vice Admiral) W. L. Rodgers, "Future International Laws of War," this JOURNAL, Vol. 33 (1939), p. 449 ff.

²⁵ This JOURNAL, Supp., Vol. 31 (1937), pp. 179, 182.

struction expressly in the London Non-Intervention Agreement of March 8, 1937. In this arrangement they stated, together with eighteen other Powers, that if any of their nationals committed an offense against this treaty, he "would thereby be committing an offense against the laws of his own country" subjecting him, in this instance, to prosecution and punishment by his national authorities.²⁶ There seems to be no compelling reason why this construction of treaty offenses should not be applied also to acts outlawed by treaty as piratical conduct even if the characterization of these acts as piracy were to result in their universal repression by all States.²⁷

(6) "*War crimes*" deemed penal offenses against municipal law in recent practice of States. The description of criminal offenses against the rules of warfare as penal offenses against the national legislation of States is substantiated by the recent practice of States. Article 228 of the Treaty of Versailles, for example, like similar provisions in the other treaties of peace of 1919-1920, provides for the trial and punishment as "laid down by law" of all ex-enemy persons "accused of having committed acts in violation of the laws and customs of war."²⁸ According to the American Memorandum basic to this stipulation, the law and procedure applicable to these trials were to be "the law and procedure for determining and punishing such violations established by the military law of the country" or countries against which the offense has been committed and whose tribunals would be trying the accused. The American members of the Commission on Responsibilities, Messrs. Lansing and Scott, based this view on the absence of an international penal law upon which a criminal indictment of offenders against the rules of warfare could be based.²⁹ The Japanese delegation apparently shared this viewpoint since they questioned "whether international law recognizes a penal law as applicable to those who are guilty" of acts contrary to the law of war.³⁰ And although the British delegates apparently maintained that acts contrary to the rules of warfare are offenses against the law of nations because incorporation of the conventional laws of war into municipal regulations does not affect the legal nature of the norms applicable to criminal

²⁶ This JOURNAL, Supp., Vol. 31 (1937), p. 176.

²⁷ For comment on the as-if piracy treaties, see Finch, "Piracy in the Mediterranean," this JOURNAL, Vol. 31 (1937), p. 659 ff.; "The Nyon Arrangements—Piracy by Treaty?" (unsigned) 19 B.Y.I.L. (1938), p. 193 ff.; C. Schmitt, "Der Begriff der Piraterie," 4 *Völkerbund und Völkerrecht* (1938), p. 351 ff. Cf. also Raoul Genet, "The Charge of Piracy in the Spanish Civil War," this JOURNAL, Vol. 32 (1938), p. 253 ff.; H. W. Briggs, "De Facto and De Jure Recognition: The Arantzazu Mendi," *ibid.*, Vol. 33 (1939), p. 689 ff.

²⁸ This JOURNAL, Supp., Vol. 13 (1919), p. 250 ff. For similar provisions, see the Treaty of Saint-Germain-en-Laye (Austria), Art. 173, *ibid.*, Vol. 14 (1920), p. 55; of Neuilly-sur-Seine (Bulgaria), Art. 118, *ibid.*, p. 221; of Trianon (Hungary), Art. 157, *ibid.*, Vol. 15 (1921), p. 48, and the unratified Treaty of Sèvres (Turkey), Art. 226, *ibid.*, p. 234.

²⁹ *Loc. cit.*, p. 141. Cf. Scott, "Trial of the Kaiser," *loc. cit.*, p. 250 ff.; R. Lansing, "Some Legal Questions of the Peace Conference," this JOURNAL, Vol. 13 (1919), p. 644 ff.

³⁰ Japanese Reservations, *loc. cit.*, p. 152.

violations of these laws, they joined the Commission on Responsibilities in its recommendation that the punishment for offenses against "the principles of the law of nations" shall be the punishments imposed by the law of the country or countries represented on the trial court.³¹ At the Peace Conference itself the American argument prevailed as evidenced by the penal clauses cited above. The American construction of offenses against the rules of warfare as criminal offenses against the municipal law of States was adopted, further, by the German Supreme Court while adjudicating cases arising under Article 228 of the Treaty of Versailles. In the *Llandovery Castle* case this tribunal stated that "A violation of the law of nations in warfare is . . . a punishable offense so far as, in general, a penalty is attached to the deed" and held that the offense in question was punishable as a criminal offense under German military law. Accordingly, it sentenced the two defendants under the German military penal code.³² Furthermore, in the recent case of the German Saboteurs the United States Supreme Court based its decision on similar grounds. Even though the court's *obiter dicta* in this case indicate that the law of war at times may, as Professor Hyde states, "address its injunctions to individuals by attaching an internationally illegal quality to particular acts," specifically it upheld the power of a military commission to try and sentence according to municipal legislation and procedures the petitioners guilty of acts which in fact were recognized and sanctioned as penal offenses contrary to the rules of warfare by national regulations enacted by the Congress and the President as Commander-in-Chief.³³ On the whole, other countries adhered to similar judicial practices in the past.³⁴

Thus, criminal acts of violence committed by members of armed forces contrary to the law of war are generally deemed crimes against the municipal law of States. On the basis of this traditional relation between individuals and the rules of warfare, Commissioner Nielsen once criticized Oppenheim's description of penal offenses against the laws of war as "war crimes" because the term "war crime" suggests an offense against the law of nations. The term's implication, Nielsen observed, is contrary to the legal nature of such offenses as constituting crimes under municipal regulations which, he added, is acknowledged in Oppenheim's definition of them.³⁵

³¹ See Commission on Responsibilities, *loc. cit.*, p. 118 ff. (Nos. 3, 4); Lloyd George, *op. cit.* I, p. 59 ff.

³² This JOURNAL, Vol. 16 (1922), pp. 709 ff., 721.

³³ *Ex parte Quirin et al*, *ibid.*, Vol. 37 (1943), p. 152; C. C. Hyde, "Aspects of the Saboteur Cases," *ibid.*, p. 91.

³⁴ See, e.g., Colby, "War Crimes," *loc. cit.*, p. 496 ff.; Renault, *loc. cit.*, p. 18 ff.

³⁵ Opinion in The United States on behalf of Baba Abraham (etc.) v. The Republic of Turkey, American-Turkish Claims Settlement (1937), p. 438; Oppenheim, *op. cit.*, II, p. 453 ff. Cf. also British Manual of Military Law, Ch. XIV, Art. 441, p. 302, and U. S. Rules of Land Warfare, Ch. 11, Par. 346, p. 86.

II. DEFENSES APPLICABLE TO CRIMINAL CHARGES GROWING OUT OF VIOLATIONS OF THE LAWS OF WAR

According to the London resolution previously cited, any person who has ordered, perpetrated or participated in a criminal act of violence contravening the laws of war or "at variance with accepted ideas concerning acts of war" is liable to penal punishment. This statement seems to disregard established practice which recognizes act of state or superior orders as a good defense to a criminal charge based on an infraction of the rules of warfare and which prohibits criminal punishment for an act not contrary to the positive laws of war and not defined as a penal offense prior to its commission.³⁶

(1) *Act of State*. The principle that members of the armed services of a nation are not personally liable and subject to penal punishments for acts contrary to the law of war done by them in the name and on behalf of the State is a customary rule of warfare which was formally ratified in Article 3 of the Fourth Hague Convention of 1907 cited above.³⁷ In keeping with this maxim and with the tenor of the Wilson notes of 1918 regarding the terms of peace, the armistice conditions of 1918 between the Allied Powers and Germany stipulated in part that "No person shall be prosecuted for participation in military measures prior to the signature of the Armistice."³⁸ For the same reason, the Commission on Responsibilities in 1919 admitted that acts of state contravening the law of nations could not be made the subject of criminal proceedings against individuals because no penal sanctions attached to international wrongs in the past. When, therefore, this commission nevertheless imputed a criminal liability to the rulers of the Central Powers for acts of aggression even while not charging them with the crime of war itself, both the American and Japanese delegates objected to this "unprecedented" doctrine of personal penal responsibility of individuals for acts of state.³⁹ Consequently, Article 227 of the Treaty of Versailles charges the acts complained of to the head of a nation on the ground that they were breaches not of international law but of international morality, whereas Articles 231 and following of the same treaty accept the traditional principle

³⁶ At the Allied Conference on German War Crimes, Mr. Tsouderos, Greek Premier-in-exile, Mgr. Scramek, Czechoslovak delegate, and Mr. Bech, representing Luxembourg, intimated that neither act of state nor superior orders would constitute a defense to a charge of war crimes. *Loc. cit.*, pp. 33, 34.

³⁷ See, e.g., Wheaton's Elements of International Law (Carnegie ed., 1936), by G. G. Wilson, Sec. 291 and note, p. 311 ff.; Moore's Digest of International Law (1906), Vol. II, pp. 24-30; G. H. Hackworth, Digest of International Law, Vol. II (1941), p. 405 ff.; Annual Digest of Public International Law Cases (1919-1922), *In re Toebinte*, etc., p. 121 ff.; K. Strupp, "Mac-Leod-Fall," II *Wörterbuch* (1925), p. 1 ff.; Fauchille, *loc. cit.*, p. 415.

³⁸ For the Wilson notes, see this JOURNAL, Supp., Vol. 13 (1919), p. 85, and the Armistice, *ibid.*, p. 98.

³⁹ Report of the Commission on Responsibilities, *loc. cit.*, pp. 118-120; American Memorandum, *loc. cit.*, p. 135 ff.; Japanese Reservations, *loc. cit.*, p. 152.

of the civil responsibility of the State for internationally illegal acts perpetrated by its agents or representatives in its behalf.⁴⁰ In 1923, moreover, the rule of the sole responsibility of the nation for acts of state was accepted as good law by the Commission of Jurists charged with a revision of the laws of war by the "Big Five" of the Washington Disarmament Conference of 1921-1922.⁴¹ Thus, according to international conventions and traditions, individuals are not to be punished criminally for acts of state violating the law of war.

(2) *Respondeat superior*. The maxim that members of the armed services of a country are not personally responsible and liable to penal punishment for acts perpetrated by them in contravention of the rules of warfare under the orders or sanction of their governmental or military superiors does not form part of the codified law of war. Nevertheless, it appears to be a recognized principle of this law. Since 1914, at least, the maxim has been incorporated in the war manuals of the Powers as a rule of the customary laws of war.⁴² In 1919, moreover, the Commission on Responsibilities in principle accepted this maxim in recommending that, while civil and military authorities cannot be relieved from liability on the ground that a higher authority might have been convicted for the same offense, "it will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility."⁴³ It seems that in the light of this recommendation, and in the absence of express provisions showing a contrary intent, the penal clauses of the treaties of peace of 1919-1920 dealing with ordinary offenders against the laws and customs of war should not be construed as invalidating this defense although they are silent on this point. Furthermore, the attempt made in Article 3 of the Washington Treaty of February 6, 1922, to set aside expressly this defense in so far as applicable to acts connected with unrestricted submarine warfare furnishes evidence of its validity after the last war.⁴⁴ Positive evidence of the validity of this maxim is found also in the report of the Commission of Jurists charged in 1922 by the Washington Treaty Powers with a revision of the law of war. Even though this commission suggested in one instance that the use of distress signals and messages as ruses of war should render "the perpetrator personally responsible under international law"—but liable to penal punishment under the municipal law of States—in another draft rule it expressly stipulates that persons acting under orders are exempt from responsibility for offenses against the law of war as contained in its report.⁴⁵

⁴⁰ *Loc. cit.*, p. 250 ff.

⁴¹ Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare. General Report, Part II, Art. 23, Sec. 5, this JOURNAL, Supp., Vol. 32 (1938), p. 24.

⁴² Finch, "Superior Orders and War Crimes," this JOURNAL, Vol. 15 (1921), p. 442.

⁴³ Report of the Commission on Responsibilities, *loc. cit.*, p. 117.

⁴⁴ The penalty of Art. 3 was to be applicable "whether or not such person is under orders of a governmental superior." *Loc. cit.*, p. 59. For the penal clauses, *cf. supra*, n. 28.

⁴⁵ General Report, Arts. 10, 12, and *cf.* Art. 11, *loc. cit.*, p. 10 ff.

Although the principle *respondeat superior* thus appears unquestioned, the practical difficulties attending allocation of personal responsibility for authorized violations of the laws of war have at times led to a denial of this defense.⁴⁶ However, the solution of this problem must be sought in the applicable municipal regulations of the Powers rather than in an outright rejection of the rule. For example, the United States Rules of Land Warfare designate commanders ordering or sanctioning a violation of the laws of war as the persons punishable for any resulting criminal wrongs committed by their subordinates.⁴⁷ The British Manual of Military Law adds government officials to general officers as the individuals responsible for crimes committed by persons under their authority or command.⁴⁸ The German doctrine apparently extends such personal liability also to inferior military or naval officers provided they participated actively in the framing and execution of an order manifestly and indisputably contrary to the law of war and illegal under the military regulations of their own country.⁴⁹ The French view seems to be a combination of the above conceptions, although some French writers hold that any member of armed forces is personally responsible for a criminal violation of the rules of warfare committed by him wilfully and knowingly even though in execution of a command.⁵⁰ Thus, in spite of the difficulties attending allocation of personal penal responsibility for authorized violations of the laws of war, and although varying standards of liability are employed, municipal regulations in fact recognize the principle of superior orders as a good defense to a criminal charge based on a violation of the law of war.⁵¹

(3) *Acts not prohibited by the positive law of war and not made crimes prior to their commission.* The statement in the London resolution that "acts at variance with accepted ideas concerning acts of war" as well as acts contrary to the rules of warfare will be punished after the present conflict recalls the allegation made in 1919 by the Commission on Responsibilities that acts contravening either the laws and customs of war or the laws of humanity are

⁴⁶ See, e.g., Bellot, in 36 Can. L. T., p. 573 ff., and 37 *ibid.*, p. 21 ff.; Mérignhac, *loc. cit.*, pp. 49-51; Garner, *loc. cit.*, p. 85 ff.

⁴⁷ Par. 347, p. 87.

⁴⁸ Ch. XIV, Art. 443, p. 302.

⁴⁹ See the cases of the *Dover Castle* and of the *Llandoverly Castle*, this JOURNAL, Vol. 16 (1922), p. 704 ff.

⁵⁰ See, e.g., Renault, *loc. cit.*, p. 23 ff.; M. Nast, "Les sanctions pénales de l'enlèvement par les Allemands du matériel industriel en territoires français et belges occupés par leur troupes," 26 R.G.D.I. (1919), p. 121; Colby, *loc. cit.*, p. 608 ff.

⁵¹ Cf., e.g., Oppenheim, *op. cit.*, II, p. 453 ff.; Finch, *loc. cit.*, pp. 440-445; G. G. Battle, "The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes," 8 Virg. Law Rev. (1921-1922), p. 20 ff. In recent statements endorsing the aim of the London resolution, Mr. Welles said in part that "no element in any nation shall be forced to atone vicariously for crimes for which it is not responsible," and President Roosevelt remarked that "It is our intention that just and sure punishment shall be meted out to the ringleaders" responsible for war crimes. See Department of State Bulletin, May 30, 1942, Vol. VI, p. 487, and Oct. 10, 1942, Vol. VII, p. 797.

crimes punishable at law. At that time the American delegates objected to this recommendation because it disregards the established principle that no act shall be punished as a crime unless it has been defined as such by statute antedating its commission. As a result of this objection the Paris Peace Conference decided against criminal punishment by analogy and limited criminal proceedings to violations of the generally accepted laws of war.⁵² Although the legal principle motivating this action has been infringed recently by dictatorial decree, it still holds as a basic rule of the criminal law of civilized countries.⁵³

However, the principle *nullum crimen, nulla poena sine lege* does not necessarily apply to acts prohibited by the established rules of warfare but not made crimes by the offender's national regulations. If foreign law and its standards of criminal responsibility may be used in this situation, then liability can be imputed under it. This solution was in fact suggested by the Commission on Responsibilities and its American members in 1919, although the latter disagreed with the commission's standards of criminal liability when inaction alone was the charge. The Japanese delegation, however, favored national law as the sole criterion of responsibility for criminal breaches of the law of war. The German delegation at Versailles took the same view.⁵⁴ It appears, therefore, that this solution is contingent upon the issue of jurisdiction over war crimes which is discussed below. However, if foreign law may be applied in this situation without violating the rule against *ex post facto* criminal punishment, its application is, of course, limited by the defenses act of state and superior orders since they are part of the law of war.

III. JURISDICTION OVER CRIMINAL OFFENSES AGAINST THE LAWS OF WAR

The London resolution of January 13, 1942, provides for postwar punishment "through the channel of organized justice" of the persons, whatever their nationality, who are charged with criminal infractions of the laws and customs of war.⁵⁵ The resolution thus dissociates postwar jurisdiction over war crimes from the nationality of the offender but does not specify the tribunals which are to try the accused. According to the past practice of belligerents, however, the national authorities of the offender as a rule ex-

⁵² Report of Commission on Responsibilities, *loc. cit.*, p. 121; American Memorandum, *loc. cit.*, p. 143, and *supra*, n. 29.

⁵³ Cf. Permanent Court of International Justice, Publications, Ser. A/B, No. 65, Case Concerning the Consistency of Certain Legislative Decrees with the Constitution of the Free City of Danzig (1935), pp. 39 ff., 51 ff.; S. Glaser, "Nullum crimen sine lege," 26 *Jr. of Comp. Legisl. and Intl. Law*, Third Ser. (1942), pp. 29-37.

⁵⁴ See Report of Commission on Responsibilities, *loc. cit.*, p. 121; American Memorandum, *loc. cit.*, p. 140 ff.; Japanese Reservations, *loc. cit.*, p. 152 (which question also the doctrine of negative criminality), and A. Luckau, The German Delegation at the Paris Peace Conference (1941), p. 369 ff.

⁵⁵ *Loc. cit.*

ercise such jurisdiction during or after hostilities unless the person charged is a prisoner of war. Nevertheless, since the rules of warfare, on the whole, are silent with respect to *post bellum* proceedings, postwar trials of war criminals before former enemy tribunals or before an international court have been proposed as authorized also by the law of war.

(1) *Exclusive national jurisdiction during or after war.* According to a well established customary rule of international law, the members of friendly or hostile armies stationed or operating abroad are exempt from the normal criminal jurisdiction of the place.⁵⁶ For this reason, international agreements on the conduct of hostilities generally look to national tribunals for the punishment of war crimes irrespective of the place of their commission.⁵⁷ Thus, during war belligerents are not compelled to surrender members of their armed forces to foreign civil or military tribunals for trial on charges of war crimes, and such surrenders as a rule are not voluntarily made.⁵⁸ Moreover, in the practice of States prior to 1918 a treaty of peace generally operated as an amnesty for penal offenses contrary to the laws of war, so that former enemy nationals as a rule were not extraditable to, nor tried and punished by, ex-enemy countries for such offenses after war.⁵⁹ In principle, therefore, and in the absence of contrary international provisions, individuals of the armed services of a State during or after hostilities are subject as a rule to the exclusive jurisdiction of their national authorities with respect to war crimes committed by them contrary to the law of war.

(2) *Concurrent jurisdiction of belligerents over prisoners of war.* However, the laws of war in proper cases also permit belligerents to punish captured enemy nationals for offenses against their rules. As early as 1865 Lieber's Instructions stated that "a prisoner of war remains answerable for his crimes against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."⁶⁰ Although this concurrent jurisdiction of belligerents over war crimes committed by captured enemy persons has been disputed at times, practice generally con-

⁵⁶ Cf. H. W. Halleck, "Military Tribunals and Their Jurisdiction," this JOURNAL, Vol. 5 (1911), p. 958 ff.; Colby, "Courts Martial and the Law of War," *ibid.*, Vol. 17 (1923), p. 109 ff.; A. King, "Jurisdiction over Friendly Foreign Armed Forces," *ibid.*, Vol. 36 (1942), p. 539 ff.; Moore's Digest, II, pp. 24 ff., 559 ff.; Hackworth, *op. cit.*, p. 405 ff.; Bonfils-Fauchille, *Manuel de Droit International Public* (3rd ed., 1901), Sec. 1172, p. 651.

⁵⁷ See, e.g., Arts. 1 and 3 of the Fourth Hague Convention of 1907, and Arts. 41, 43, 56, Sec. 2, of the Hague Regulations annexed to it (*loc. cit.*, pp. 92 ff., 112 ff.); also Arts. 26, 28-30 of the Red Cross Convention of 1929 (*loc. cit.*, p. 54 ff.).

⁵⁸ Cf. Art. 43, Hague Regulations of 1907 (*loc. cit.*, p. 112 ff.), and U. S. Military Government (War Department, Washington: 1940), Par. 25 (b), p. 13 ff.

⁵⁹ Cf. C. Phillipson, *Termination of War and Treaties of Peace* (1916), p. 243 ff.; Verdross, "Die Amnestieklausel in den Friedensverträgen," I *Wörterbuch* (1924), p. 38 ff. Cf. also Art. 41 of the Hague Regulations of 1907 (*loc. cit.*, p. 112), and British Manual of Military Law, Ch. XIV, Art. 300, p. 279, which lend support to this claim.

⁶⁰ Lieber's Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (1863), Art. 59, p. 17.

firms it as based on the common laws of war.⁶¹ The conventional rules of warfare likewise sustain this jurisdiction even though they do not specifically refer to war crimes. These rules provide that the law and procedure applicable to the prosecution and punishment of criminal or disciplinary offenses perpetrated by prisoners of war shall be the law and procedure in force in the armed services of the detaining Power.⁶² Since no one disputes the undoubted right of a nation to try and punish its own subjects for acts violating the laws of war, it follows that during hostilities belligerents have, *mutatis mutandis*, a concurrent jurisdiction to try captured enemy subjects for such offenses provided national treatment is accorded in the exercise of this reciprocal right. This concurrent jurisdiction, moreover, continues after the cessation of hostilities and until the coming into force of the treaty of peace. Thereafter prisoners of war charged with war crimes but not yet tried and sentenced for them must be released unless express provisions to the contrary set aside the usual amnesty for such offenses implied in a treaty of peace.⁶³

(3) *Postwar jurisdiction of belligerents over former enemy subjects.* It has been contended that the concurrent criminal jurisdiction of belligerents over prisoners of war charged with war crimes extends also to postwar trials of any ex-enemy person accused of such offenses before the civil or military tribunals of former enemy countries or before an international court. The former enemy State is said to acquire such jurisdiction when the offense is actually or constructively committed in its territory or against one of its nationals abroad.⁶⁴ The conventional laws of war do not provide for this case. In this connection they merely stipulate that a prisoner of war may be detained after the conclusion of peace until the end of a penal prosecution pending against him "for a crime or an offense of municipal law" or until the expiration of the punishment imposed upon him for such an offense.⁶⁵ It would seem, therefore, that postwar proceedings in ex-enemy tribunals or in an international penal tribunal against any former enemy person accused

⁶¹ See, e.g., Grimm, "Das Gefangenensproblem," 30 *Deutsche Juristenzeitung* (1925), p. 58 ff.; Strupp, *loc. cit.*, p. 2, and *contra*, Oxford Manual of the Laws and Customs of War on Land (1880), Art. 41, Comment, *loc. cit.*, p. 41 ff.; U. S. Rules of Land Warfare, Par. 34C (C), p. 86; British Manual of Military Law, Arts. 441, 443, p. 302; Oppenheim, *op. cit.*, II, p. 452 ff., and I, p. 663. Cf. also *Ex parte Quirin, et al.*, U. S. Sup. Ct. (1942), *loc. cit.*

⁶² See, e.g., Arts. 4, 8 and 12, Hague Regulations of 1907 (*loc. cit.*, p. 98 ff.), and Arts. 45, 46, 51, 52, 53 and 75 of the Convention of 1929 relating to the Treatment of Prisoners of War (*loc. cit.*, p. 75 ff.).

⁶³ See Oppenheim, *op. cit.*, II, p. 481, and n. 3, and P. Simon, "La clause d'amnistie dans les traités de paix," 26 R.G.D.I. (1919), pp. 251, 261, both of whom refer to the Treaty of Pretoria of 1902 as the one recent instance where punishment was stipulated after cessation of hostilities and before formal peace.

⁶⁴ See, e.g., Garner, *loc. cit.*, p. 82 ff., and the French writers cited there; Bellot, in 36 Can. L. T. (1916), p. 757 ff.; Scott, *loc. cit.*, p. 247 ff.

⁶⁵ See, e.g., Arts. 53 and 75 of the Convention of 1929 relating to the Treatment of Prisoners of War, *loc. cit.*, pp. 77, 81.

except of a war crime constitute an issue of the judicial policy of nations except where limited by international law.

(a) *Concurrent postwar jurisdiction of former enemy civil tribunals.* The claim that the local civil tribunals of former enemy countries have a concurrent postwar jurisdiction over any former enemy national charged with a criminal violation of the rules of warfare rests on the assumption that a penal offense contrary to the laws of war constitutes also a crime under the common law of the place considered to remain in force and binding members of hostile forces stationed there.⁶⁶ This assumption, however, runs counter to the established principle which exempts members of armed forces from the normal criminal jurisdiction of occupied territory for their acts contrary to the law of war. On this ground, at least, the United States Supreme Court has ruled repeatedly against the postwar jurisdiction of local civil tribunals of former enemy countries over ex-enemy persons charged with war crimes.⁶⁷ But this ruling was not accepted in 1919 by the Commission on Responsibilities of the Paris Peace Conference. This commission, *inter alia*, contended for the international right of each belligerent to try during or after war according to its own law and procedure every enemy person charged with a penal offense against the laws and customs of war, provided the accused has been taken prisoner or has otherwise fallen into the power of the country charging him with the offense.⁶⁸ Subsequently, moreover, some French and Belgian tribunals actually prosecuted a few Germans for acts contrary to the rules of warfare on the ground that war crimes committed within their territory were subject to the local law.⁶⁹

However, the assumption that penal offenses committed by members of hostile forces in zones of operation or in occupied territories contrary to the laws of war are triable after hostilities in the local civil courts has not been generalized in the past. It might be argued, of course, that the present practice of granting immunity from the normal criminal jurisdiction of the place to members of foreign friendly armies by formal bilateral agreement implies that, in the absence of such formal waiver of jurisdiction and grant of immunity, foreign hostile forces cannot claim exemption from the jurisdiction of the local courts. But no such construction of this practice was advanced after the last world conflict and is in fact not suggested now.⁷⁰ Nor could Article 3 of the unratified Washington Treaty, previously cited, be construed as granting a postwar jurisdiction over war crimes to local civil tribunals. The stipulation in this article that offenders against the rules of maritime

⁶⁶ See, e.g., Renault, *loc. cit.*, p. 28; Mérignhac, *loc. cit.*, p. 32 ff.; Nast, *loc. cit.*, p. 120 ff.; Garner, *loc. cit.*, p. 76 ff.

⁶⁷ Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes," this JOURNAL, Vol. 14 (1920), p. 218 ff.

⁶⁸ Report of the Commission on Responsibilities, *loc. cit.*, p. 121.

⁶⁹ See Colby, "War Crimes and Their Punishment," *loc. cit.*, p. 40 ff.; Feilitsch, "Der Fall Nathusius," 29 *Deutsche Juristenzeitung* (1924), p. 971 ff.

⁷⁰ At least not in the case of friendly foreign armed forces. See King, *loc. cit.*, p. 549 ff.

warfare could be tried before civil or military authorities was to apply only to prisoners of war charged with "piracy," which is ordinarily triable in civil courts. Furthermore, where civil tribunals, in cases other than the French and Belgian postwar proceedings mentioned above, have exercised *post bellum* jurisdiction over war crimes, the prosecutions actually concerned persons possessing the nationality of the tribunal and, in addition, jurisdiction did not derive from the law of war but rested either on the application of the local law to persons properly subject to it or on domestic enabling legislation conferring a special competency upon the civil court. The trials of a few French nationals before their local civil tribunals after the Franco-Prussian War of 1870-1871 on charges of abetting German soldiers in the commission of offenses allegedly contrary to the law of war, and the proceedings before the Leipzig Supreme Court against Germans charged in Article 228 of the Treaty of Versailles with war crimes, illustrate these exceptional situations.⁷¹ These cases do not support the assertion that territorial courts possess an ordinary postwar jurisdiction over war crimes committed by members of foreign hostile forces during war, although the French trials furnished the French jurist Renault with the basis for advancing this claim. At best they demonstrate that the local civil tribunals may exercise a postwar jurisdiction over their nationals charged with war crimes, or over "Quislings" charged with acts allegedly contrary to the law of war but actually constituting crimes against local common law for which they were not punished by the occupying authority.⁷² It would seem, therefore, that, in the absence of international agreement abrogating or modifying the customary rule granting immunity to hostile forces from the normal jurisdiction of the place, the view expressed by the United States Supreme Court after the Civil War of 1861-1865 to the effect that the local civil courts of former belligerents have no postwar jurisdiction over war crimes committed during hostilities by former enemy persons in occupied territory still states the true rule of international law.

(b) *Concurrent postwar jurisdiction of the military tribunals of former enemy countries.* The claim that the military tribunals of former enemy countries may try after a war any ex-enemy person charged with a penal offense against the rules of warfare rests on the assumption that under the common laws of war belligerents not only during hostilities but also after their formal termination possess an ordinary concurrent jurisdiction over war crimes committed in their territory or against their nationals by subjects of the former enemy State.⁷³ On this basis, the American representatives on the

⁷¹ See Renault, *loc. cit.*, p. 18, for the French trials, and this JOURNAL, Vol. 16 (1922), p. 674 ff., for the German proceedings. Cf. also Frank, *loc. cit.*, p. 1090; Colby, "War Crimes," *loc. cit.*, p. 497.

⁷² For isolated similar cases based on ordinary offenses against local law, see Annual Digest of Public International Law Cases (1919-1922), Nos. 335, 338, pp. 469, 474. Cf. also C. Rousseau, "Jurisprudence Française," 42 R.G.D.I. (1935), p. 225 ff.; Simon, *loc. cit.*, p. 249 ff.; Oppenheim, *op. cit.*, II, p. 356; King, *loc. cit.*, p. 551.

⁷³ See, e.g., Scott, *loc. cit.*, p. 247 ff.; Renault, *loc. cit.*, p. 28.

Commission on Responsibilities, Messrs. Lansing and Scott, maintained in 1919 that post bellum trials in the several or joint military tribunals of former enemy countries are not contrary to international law—nor, incidentally, *ex post facto* criminal proceedings prohibited by the Constitution of the United States—because in the circumstances instanced individuals are properly subject to foreign military law and tribunals applying the common laws and customs of war as contained in national military regulations.⁷⁴ Furthermore, the Paris Peace Conference formally sanctioned the American view although it elected passive nationality as the sole basis of the jurisdiction proposed. Consequently, the penal clauses of the treaties of peace of 1919–1920 recognize, *inter alia*, the right of former enemy nations to institute criminal postwar proceedings in their several or mixed military courts against any former enemy person “accused of having committed acts in violation of the laws and customs of war” against the nationals of Allied States, and to punish those “guilty of criminal acts” in accordance with the military law and procedure of the Allied country or countries represented on the trial court.⁷⁵

The German delegation at Versailles, however, objected to these penal provisions on the ground that the law of nations and the past practice of States admit only an exclusive national postwar jurisdiction over offenders against the rules of warfare, so that foreign countries can solely demand the trial and, if guilty, punishment of the accused by his own State. This objection was based on the assumption that the amnesty for offenses against the law of war customarily flowing from a treaty of peace has hardened into an inflexible rule of international law which prohibits foreign postwar proceedings against the members of the forces of the opposite side on charges of war crimes.⁷⁶ The Allied Powers, however, took the view that the traditional amnesty for war crimes constitutes not a general, but a contractual, rule of international law which may be set aside by express provisions to the contrary in a particular peace. As a result, the penal clauses previously mentioned include specific stipulations whereby the Central Powers waive their exclusive national jurisdiction over war crimes committed by their subjects at home or abroad against the nationals of Allied countries, and whereby they consent, “notwithstanding that peace may have been declared,” to surrender the persons charged for trial in foreign military tribunals and to furnish any evidence required for this purpose.⁷⁷

Nevertheless, no actual precedent for the concurrent military postwar

⁷⁴ American Memorandum, *loc. cit.*, pp. 127 ff., 140 ff.

⁷⁵ See Treaty of Versailles, Arts. 228–230, *loc. cit.*, p. 250 ff.; of Saint-Germain-en-Laye, Arts. 173–176, *loc. cit.*, p. 55 ff.; of Neuilly-sur-Seine, Arts. 118–120, *loc. cit.*, p. 221; of Trianon, Arts. 157–160, *loc. cit.*, p. 48 ff., and (unratified) Treaty of Sèvres, Arts. 226–229, *loc. cit.*, p. 234 ff. Cf. also Scott, *loc. cit.*, p. 250 ff.; Lansing, *loc. cit.*, p. 644 ff., and Finch, “Retribution for War Crimes,” *loc. cit.*, p. 87, n. 17.

⁷⁶ Luckau, *op. cit.*, p. 369 ff. (German counterproposals of May 29, 1919).

⁷⁷ See Report of the Commission on Responsibilities, *loc. cit.*, p. 123 ff.

jurisdiction of belligerents was established under the penal clauses of the treaties of peace of 1919-1920. Only a few German prisoners of war were tried before French and British courts-martial after the close of hostilities.⁷⁸ Although the Allied Powers at the Peace Conference had argued that justice and the necessity of establishing a deterring precedent compel a departure from the tradition created by earlier peace settlements, and that trial and punishment of war criminals "by their accomplices in their crimes" could not serve these ends, the Powers assented later to national postwar proceedings against the persons charged by them with war crimes in Article 228 of the Treaty of Versailles.⁷⁹ This action, even if conditioned by the right to retry abroad Germans not properly prosecuted at home, had the effect of ratifying the claim that national authorities possess an exclusive postwar jurisdiction over their subjects charged with war crimes. This claim, furthermore, received formal ratification in the Declaration of Amnesty appended to the Treaty of Lausanne of July 24, 1923. In this amnesty all of the principal Allied Powers which signed and ratified the Treaty of Versailles set aside expressly the penal clauses of the unratified Treaty of Sèvres of August 10, 1920, which provided for postwar trials in foreign military tribunals or in an international court of Turks charged with offenses against the law of war and of humanity. The amnesty also annuls all penalties hitherto imposed on such grounds upon prisoners of war and interned civilians.⁸⁰ Thus the formal precedent for the military postwar jurisdiction of former enemy countries embodied in the penal provisions of the treaties of peace of 1919-1920 appears to have been vacated by the principal Allied Powers, so that the previous rule was restored. This rule, however, provided that postwar jurisdiction over war crimes committed by members of the armed services of a country belongs exclusively to the national tribunals of the accused.⁸¹

(c) *International postwar jurisdiction for the trial of war crimes.* The claim to international postwar proceedings against war criminals rests on the assumption that war crimes basically constitute international penal offenses which are subject to the universal jurisdiction of the belligerent Powers and may be prosecuted by them in their municipal tribunals or in an international court set up for this purpose by all or some of the belligerents on grounds of policy

⁷⁸ For these military postwar trials, see Colby, *loc. cit.*, p. 497, and n. 73.

⁷⁹ Luckau, *op. cit.*, p. 442 (Allied reply of June 16, 1919), and Allied note of May 7, 1920, to the President of the German Delegation, this JOURNAL, Supp., Vol. 16 (1922), p. 195 ff.

⁸⁰ Declaration of Amnesty, this JOURNAL, Supp., Vol. 18 (1924), pp. 92-94, signed by the British Empire, France, Italy, Japan, Greece, Rumania and Turkey. Cf. also Treaty of Lausanne, Art. 120 (*ibid.*, p. 46), and Agreement between Greece and Turkey respecting the reciprocal exchange of prisoners of war, Art. 5 (*ibid.*, p. 91), and see Strupp, "Der Lausanner Frieden," I *Wörterbuch*, p. 807.

⁸¹ Although it was rumored that Germany had a hand in the Riom trials, the Armistice Agreements of June 22, 1940, between France and Germany and France and Italy contain no provisions regarding trials for war crimes. This JOURNAL, Supp., Vol. 34 (1940), pp. 173, 178.

and expediency after war.⁸² On this basis, at least, the Law Officers of the Crown at the end of World War I proposed to the Imperial War Cabinet that international trials were the proper form of proceedings for punishing after a war persons accused of acts deemed by them crimes against the international law of war.⁸³ This suggestion was adopted almost verbatim by the Commission on Responsibilities in 1919. The latter, however, differentiated between offenses against the law of nations and criminal offenses against the laws of humanity and of war and suggested separate proceedings in each case. Consequently, this commission proposed, first, trial by a special inter-allied organ of the authors of acts provocative of war and accompanying its inception, including breach of neutrality treaties. Since international law admittedly did not provide for such proceedings, it was suggested that the judges determine the law and punishments applicable in this court. Secondly, the commission proposed trial by a special inter-allied high tribunal of former enemy persons, however high in civil position or military rank, including sovereigns, who are charged with war crimes committed in the territory or against the nationals of two or more Allied countries in violation of the laws and customs of war or the laws of humanity, and suggested that acts as well as omissions causing such violations should be deemed crimes triable in this court. It added that this tribunal might take jurisdiction also in cases where the character of the act charged warranted this step or where the law of an Allied country did not permit postwar trials in its national courts. The laws applicable in this second inter-allied tribunal were to be the "principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." Punishments, however, were to be based on the municipal law of the countries represented on this court or on the national law of the defendant, since the laws of war, like those of humanity, also failed to provide penal sanctions applicable to individuals charged with criminal infractions of their rules.⁸⁴

The American members of the Commission on Responsibilities, however, did not agree with the principle of these recommendations—that war crimes are international penal offenses triable in municipal or international tribunals—nor with the jurisdiction of the proposed inter-allied courts. In their view, there existed no international penal law upon which a criminal indictment could be based and tried in the proposed inter-allied courts. They pointed out that any tribunal having jurisdiction of offenses against the laws and customs of war must be a tribunal based on preëxisting law and procedure. They maintained, therefore, that the only "international"

⁸² Cf., e.g., Bellot, in 37 Can. Law Times (1917), p. 21 ff.

⁸³ See Lloyd George, *op. cit.*, I, pp. 59-64, 66.

⁸⁴ Report of the Commission on Responsibilities, *loc. cit.*, pp. 116-125. Cf. also the preamble, Fourth Hague Convention of 1907, which is apparently the source of the laws to be applied in the second court above. *Loc. cit.*, p. 92.

jurisdiction competent to try and punish these offenses would be the military authorities of the Allied Powers combined into one single court, which would function on the basis of the military law and procedure of the Allied countries represented on it. With regard to the jurisdiction of the suggested inter-allied tribunals, they stated that a sovereign could not be impleaded in a foreign jurisdiction, and that neither moral offenses infringing the laws of humanity nor omissions not constituting breaches of legal duties were punishable in any court of law.⁸⁵

On the whole, the American objections were then supported by the Japanese delegation. The latter, however, in addition raised the basic issue, whether international law confers any postwar jurisdiction upon belligerents over individuals "belonging to the opposite side." This question was answered in the negative by the German delegation. It maintained that only the preliminary or international question, whether an action alleged to have been in violation of the rules of warfare constitutes in fact an infraction of these laws, could be submitted to an international tribunal which, they added, should take jurisdiction of all alleged violations of the law of war and should be composed of neutrals and the parties to the dispute.⁸⁶

As a result largely of the American objections, the Paris Peace Conference rejected the claim that war crimes are international penal offenses triable in municipal tribunals or in an international penal court. For this reason, the penal clauses of the treaties of peace of 1919-1920 do not furnish a precedent for international postwar proceedings against war criminals as the Commission on Responsibilities intended they should do. The Allied Powers, as a matter of high international policy, in Article 227 of the Treaty of Versailles set a precedent for a special inter-allied tribunal "which has not a juridical character as regards its substance but only its form" and which was to try the head of a State for "a supreme offence against international morality, the sanctity of treaties and the essential rules of justice." The decisions of this tribunal, further, were to be guided by the "highest motives of international policy" and the judges remained free to impose what penalties they considered just for the wrongful acts encompassed by the charge.⁸⁷ This tribunal, therefore, was to be a political organ whose powers and jurisdiction depended on considerations of policy, not of law. Furthermore, with regard to criminal offenses against the laws and customs of war, the Powers provided for unilateral postwar trials in the Allied military tribunals or in mixed (inter-allied) military courts, which were discussed above as military postwar jurisdictions since they also were not to function on the basis of international law.

⁸⁵ American Memorandum, *loc. cit.*, pp. 127 ff., 140 ff.

⁸⁶ Japanese Reservations, *loc. cit.*, p. 151 ff., and Luckau, *op. cit.*, p. 370.

⁸⁷ Allied reply of June 16, 1919, to the German counterproposals, in Luckau, *op. cit.*, p. 442, and Treaty of Versailles, Art. 227, *loc. cit.*, p. 250.

(4) *Proposals for an international criminal court to try future war crimes.* In the words of the British jurist Bellot, who was instrumental in the formulation of British proposals for postwar punishment after World War I and who subsequently became one of the prime movers behind suggestions for the creation of an international criminal court for the trial and punishment of war crimes, the principal reason for the institution of such a tribunal is that "After the conclusion of peace there is no jurisdiction. The Military Courts lose their jurisdiction and the Civil Courts have no jurisdiction."⁸⁸ This judgment apparently neglects trials in the national courts of the accused as a legal alternative to international postwar proceedings. However, the prosecutions of a few German offenders before the Leipzig tribunal appeared to demonstrate the futility of domestic procedures. On the other hand, the proposed trial of the Kaiser before an inter-allied political organ also proved abortive.⁸⁹ To avoid repetition of these experiences, a number of plans were advanced after the last world conflict for the creation of an international penal law and jurisdiction competent to prevent or punish, not only criminal acts contrary to the law of war and acts provocative of war or accompanying its inception, but also acts to be deemed penal offenses against existing or a "new" international law for the outlawry of war itself.

The first significant proposal made along these lines after Versailles was contained in the semi-official draft for an International High Court of Justice submitted on July 13, 1920, to the Hague Advisory Committee of Jurists by its presiding Belgian member, Baron Descamps. This plan envisaged the immediate creation of an international criminal tribunal of first instance invested with a broad civil and criminal jurisdiction over crimes against international public order and the universal law of nations committed by individuals in time of peace or of war. The proposed court, Baron Descamps explained, would be competent to try and punish individuals charged with the crime of having made war, with criminal acts of violence perpetrated contrary to the laws of war, or with penal offenses endangering the security of international institutions. M. de Lapradelle, French co-sponsor of the proposal, added that the proposed tribunal would also be capable of trying piracy or similar "offenses against international law." The laws applicable in this tribunal, Baron Descamps stated in a phrase used earlier by the Commission on Responsibilities, would be "the principles of the law of nations, as derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." However, since these laws do not define any penal offenses, the draft leaves it to the

⁸⁸ International Law Association, Report of the Thirty-Third Conference (Stockholm, 1924), p. 110. Cf. also *ibid.*, p. 88 ff., and Report of the Thirty-First Conference (Buenos Aires, 1922), p. 63 ff. See, further, H. H. L. Bellot, "War Crimes: Their Prevention and Punishment," Transactions of the Grotius Society, Vol. 2 (1917), pp. 31-55.

⁸⁹ For accounts of these abortive trials, see, *e.g.*, E. J. Cohn, "The Problem of War Crimes Today," Transactions of the Grotius Society, Vol. 26 (1940), p. 132 ff.; S. Glueck, "Trial of Axis War Criminals," Free World, Vol. IV (1942), p. 138 ff.

discretion of the judges to define the acts punishable as crimes, attach a penalty to them, and designate the mode of executing sentences, provided only that the causes themselves were referred to the court by the Assembly or the Council of the League of Nations.⁹⁰

The Hague jurists did not comment favorably upon Baron Descamps' proposal. Their remarks not only show opposition to the plan's primary design, the execution of the clauses of the treaties of peace of 1919-1920; they illustrate also the major objections raised in the past two decades against the principle and technical features of any international court draft. Thus, with regard to the immediate purpose of the suggested tribunal, the Norwegian jurist, Mr. Hagerup, characterized it as "indisputably of a political nature." Considering its future utility, several members of the committee were unwilling to concede the need or desirability of a court whose successful functioning would entail major changes in the existing law and organization of the international community. In particular, they feared that the establishment of an international criminal jurisdiction would create a conflict of loyalties for individuals which, they thought, would nurture a potential menace to peace and a real danger to the security and sovereign rights of States. With respect to the technical aspects of Baron Descamps' plan, the jurists stressed difficulties flowing from the classical doctrine of the nature of international law as governing solely the conduct of States. For example, Elihu Root, then on this committee, stated that according to established legal principles nations only are responsible for acts constituting international wrongs. When M. Ricci-Busatti, the Italian member, injected that the present rules of international law cannot serve as the basis of criminal indictments against individuals, Mr. Root stressed that before an international penal tribunal competent to try individuals for international offenses can be established, States must create the law and procedure applicable in such a court. From the technical point of view, further, several members of the committee condemned the exceedingly broad grant of powers to the proposed court which would permit it to apply undefined penalties to undefined crimes and thereby violate the maxim *nullum crimen, nulla poena sine lege*. Lastly, Mr. Root and Lord Phillimore criticized the draft's failure to distinguish between war crimes and crimes committed by individuals in time of peace. They deemed it desirable to limit international criminal jurisdiction to acts of aggression and penal offenses against the law of war.⁹¹

The Hague jurists, nevertheless, advised the consideration of Baron Descamps' proposal in their report to the League of Nations.⁹² On Decem-

⁹⁰ See Permanent Court of International Justice, Advisory Committee of Jurists, *Procès Verbaux of the Proceedings of the Committee June 16th-July 24th, with Annexes* (The Hague, 1920), pp. 129, 498 ff., and for the draft, p. 521.

⁹¹ *Ibid.*, pp. 500-509.

⁹² The vote on this *vœu* was 5 : 3, with 2 abstentions (*ibid.*, pp. 514, 748). Four members expressed sympathy for a "future" international criminal court, but thought the present

ber 18, 1920, the latter body, however, definitely rejected the plan. It did so primarily on the ground that in the absence of international penal legislation the law of nations knows of no crimes which could be tried before the proposed international penal court.⁹³

Henceforth the creation of an international criminal jurisdiction and of an international penal code were espoused by small but articulate groups of private persons and associations along three fairly distinct lines of approach. One group, largely common law jurists, favored the establishment of an international criminal tribunal of first instance or of appeal competent to hear and decide the offense of having made war, criminal offenses against the law of war and acts provocative of war which were to be deemed penal offenses against international law.⁹⁴ Their plans culminated in Bellot's elaborate draft which was adopted in 1926 in a revised form by the International Law Association.⁹⁵ This draft, in general, provided for an international penal court of first instance with jurisdiction over any criminal violation of the conventional or customary laws of war committed by States or their subjects in time of war. In keeping with the spirit of the decade, the court was to hear also "cases of a penal character referred to it by the Council or the Assembly of the League of Nations for trial, or for inquiry and report" so as to constitute it an agency capable of preventing or punishing the resort to war or acts provocative of war committed by individuals or States. And in order to internationalize prosecution of offenses to be deemed breaches of existing international agreements, the jurisdiction of this tribunal was to extend, further, to "violations of international obligations of a penal character," such as piracy or the white or black slave trade, committed by individuals in time of peace against foreign States or their

proposal outside the competence of the committee; aside from the sponsors, only one member, Lord Phillimore, favored the present proposal provided it were limited to future trials of war crimes. *Ibid.*, pp. 502 ff.

⁹³ See League of Nations, Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court of International Justice (1921), pp. 225 ff., 278 ff., and League of Nations, 1920, Provisional Verbatim Records, Vol. 1, Dec. 18, 1920.

⁹⁴ See, e.g., Lord Phillimore, "An International Criminal Court and the Resolutions of the Committee of Jurists," 3 B.Y.I.L. (1922-1923), pp. 79-86, suggesting a tribunal of first instance, much like Descamps'; Lord Cave, "War Crimes and Their Punishment," Transactions of the Grotius Society, Vol. 8 (1923), pp. xix-xxxi, recommending that the Permanent Court of Arbitration at The Hague act as a court of appeal reviewing decisions of municipal (enemy) tribunals. Cf. also T. S. Woolsey, "Retaliation and Punishment," Proceedings, Am. Soc. of Intl. Law, Vol. 9 (1915), pp. 67-69, proposing a neutral tribunal of first instance, applying the national law of the defendant; and cf. his "Reconstruction and International Law," this JOURNAL, Vol. 13 (1919), p. 196 ff.

⁹⁵ See International Law Association, Report of the Thirty-Fourth Conference (Vienna, 1926), pp. 106-225, 279-309, and Bellot's amended draft, pp. 113-125. Cf. *ibid.*, Report of the Thirty-Third Conference (Stockholm, 1924), pp. 75-111, Report of the Thirty-First Conference (Buenos Aires, 1922), pp. 63-86.

subjects. The court in no event, however, was to hear charges based on any alleged offense against "international public order," and it would have to decide every case on the basis of preëxisting law. The laws applicable in this tribunal would be chiefly the conventional or customary rules of the law of nations, but subsidiarily the court could resort also to the general principles of public or international law recognized by civilized nations and to well-established rules of criminal law as evidenced in judicial decisions or in the writings of highly qualified publicists. Finally, the tribunal was not to punish any act unless it was defined in advance as a punishable offense in its statute, in the special or general conventions binding States parties to a dispute, or in the national law of the individual defendant charged by a State with a criminal infraction of the law of nations or its rules of warfare before the bar of this international court.⁹⁶

The authors of the common law plans for the establishment of an international penal court did not, however, advocate the creation of a substantive criminal law defining international penal offenses and attaching a penalty to them for the guidance of the decisions of the proposed tribunal. They relied largely on municipal law or on the discretion of the judges to determine and punish the acts to be deemed crimes against international rules preventive or regulatory of war. This lack of an international penal code motivated a second group of proposals advanced largely by civil law adherents. The principal difference between their plans and those of the first group is that they make the operation of an international criminal jurisdiction contingent upon the prior or simultaneous enactment of international penal legislation so as to prevent altogether criminal decision by analogy which, they feared, might be possible under the common law plans for an international criminal court. The drafts of the Interparliamentary Union, of the International Association of Penal Law, and of civil law jurists generally fall into this second group. These plans also differ from the common lawyer proposals in so far as their chief aim was to be the repression of acts productive of war committed by States or individuals in time of peace rather than the punishment of acts contrary to the rules of warfare committed by individuals in time of war. Consequently, the jurisdiction conferred upon the international tribunal by the penal codes incorporated into civil law proposals generally exceeds that of the common law drafts.⁹⁷

When it became apparent that none of these far-reaching plans was likely

⁹⁶ *Ibid.*, Rep. of the Thirty-Fourth Conf., Draft Articles 21, 23 and 24, p. 118 ff., and discussions, pp. 106 ff., 279 ff., esp. pp. 155 ff., 183, 202-209, 211-225, 279 ff.

⁹⁷ See *Union Interparlementaire, Compte rendu de la xxiii^e Conférence (Washington et Ottawa, 1925)*, p. 205 ff., and *ibid.*, *Compte rendu de la xxviii^e Conférence (Genève, 1932)*, pp. 18 ff., 181 ff.; *Association Internationale de Droit Pénal, Actes du Congrès de Bruxelles, 1926 (Paris: 1927), Partie V*, p. 366 ff., and Pella's Observations to Bellot's draft, in *International Law Association, Report of the Thirty-Fourth Conference*, p. 146 ff. For references to similar private proposals, see M. O. Hudson, "The Proposed International Criminal Court," this JOURNAL, Vol. 32 (1938), p. 549.

to produce any immediate results because they required drastic revisions in the orthodox theory and practice of the law of nations, some jurists offered an attenuated, but allegedly practicable, alternative for them.⁹⁸ In 1932, for example, the Rumanian criminologist, Professor Pella, one of the principal authors and drafters of the court-and-code plans mentioned above, suggested that States enter into agreements defining "acts of an international criminal character" compromising the security, good order and peace of the community of nations, and that they coöperate in prohibiting and repressing municipally the acts so defined in lieu of prosecuting the guilty individuals before an independent international court.⁹⁹ This suggestion ultimately furnished a basis of discussion for the two League conventions of November 16, 1937, relating to the repression of terrorism through State coöperation or through an optional international penal court which was to apply municipal law and penalties to the cases before it. However, the Powers refused to ratify even these conventions, which represented only a very modest beginning of the fundamental innovations proposed earlier by the two groups of jurists mentioned above.¹⁰⁰

Thus none of the plans for the institution of an international criminal jurisdiction and the enactment of an international penal code achieved any practical results. There exists, therefore, at present neither the substantive penal law nor the proper criminal tribunal for international postwar proceedings against States or individuals charged with acts provocative of war or with criminal acts of violence committed contrary to the laws and customs of war.

IV. CONCLUSION

Even a hasty analysis of recent discussions and declarations of policy concerning the punishment of Axis war criminals reveals certain basic propositions which substantiate the conclusions reached independently above.

⁹⁸ For statements of the case against these proposals other than, but similar to, those of the Hague jurists above, see, *e.g.*, remarks of Sir Graham Bower and of Messrs. C. H. Butler, J. A. Hinkley and N. Stjernberg at the Stockholm Conference of the International Law Association (*loc. cit.*, pp. 91, 93-95, 101-103, 107 ff.), and of Sir Graham Bower and Dr. Vadasz at the Vienna Conference (*loc. cit.*, pp. 153 ff., 165 ff.). Cf. also J. L. Brierly, "Do We Need an International Criminal Court?" 8 B.Y.I.L. (1927), p. 81 ff.; same, "Règles générales du droit de la paix," 58 Hague Recueil (1936), p. 88 ff.; J. S. Reeves, "International Criminal Jurisdiction," Proceedings, Am. Soc. of Intl. Law, Vol. 15 (1921), p. 62 ff.; Keith, *op. cit.*, II, p. 1160; Williams, *op. cit.*, p. 232 ff.

⁹⁹ See, *e.g.*, V. Pella, "La protection de la paix par le droit interne," 40 R.G.D.I. (1933), p. 401 ff., and *cf.* his earlier volume, *La criminalité collective des États et le droit pénal de l'avenir* (1st ed., 1925), *passim*. See also Yves de la Brière, "L'aspect juridique de désarmement moral. Les responsabilités légales de la presse et des associations," 40 *ibid.*, p. 129 ff.

¹⁰⁰ See Hudson, *loc. cit.*, p. 549 ff.; W. Mettgenberg, "Internationale Strafgerichtsbarkeit," 2 *Völkerbund und Völkerrecht* (1936), p. 18 ff.; "Convention for the Creation of an International Criminal Court" (unsigned), 19 B.Y.I.L. (1938), p. 216 ff.

First, it appears to be generally assumed as axiomatic that penal offenses against the law of war constitute crimes against the municipal law of belligerent States. Even where it is suggested that the phrase of the London resolution concerning retribution "through the channel of organized justice" refers to international postwar proceedings, it is not denied that war crimes at present are municipal law crimes. On the contrary, the protagonists of such proceedings either assume that municipal law has to furnish both the types of crimes and the measure of punishment or, in any case, the sanction for the international penal offenses which, they suggest, should be established by unilateral proclamation now.¹⁰¹ Secondly, it appears to be equally admitted that the defenses act of state and superior orders and the maxim *nullum crimen, nulla poena sine lege* condition any prosecution for war crimes. The very fact that one writer suggests a reappraisal of these orthodox principles is only further proof of their general acceptance in positive law.¹⁰² Thirdly, there seems to be a silent understanding that as a result of the failure to execute the penal clauses of the treaties of peace of 1919-1920 postwar jurisdiction over war crimes presumably still lies with the national courts of the accused. The mute recognition of this principle, however, has led to opposite conclusions with regard to the execution of an end upon which all are agreed. On the one hand, statements made recently in the House of Lords, for example, favor post-armistice trials in the several or in mixed United Nations civil or military tribunals, although earlier, but less specific, remarks of Prime Minister Churchill and President Roosevelt seemed to point in the direction of postwar trials in United Nations municipal courts.¹⁰³ In a recent statement dealing with the punishment of war crimes, Soviet Commissar Molotoff similarly suggested immediate, *inter bellum*, prosecutions of any captured Nazi ringleaders before a special "international" tribunal functioning on the basis of "criminal law."¹⁰⁴ On the other hand, less official suggestions have contended uniformly for international *post bellum* proceedings, although they are not agreed on the persons to be tried by, or the law to be applied in, the proposed international criminal

¹⁰¹ See Cohn, *loc. cit.*, p. 143; Glueck, *loc. cit.*, p. 144 ff.; J. Stránský, "The Inter-Allied Conference on War Crimes and the Problem of Retribution," *New Commonwealth Quarterly*, Vol. 7 (1942), p. 250 ff. But see (Senator) E. D. Thomas, "What we must do with War Criminals," *The American*, Feb., 1943, p. 90, assuming that war is either an intersocial or international crime as a result of the Kellogg Pact.

¹⁰² Glueck, *loc. cit.*, p. 145.

¹⁰³ For the statements in the House of Lords, see *London Times*, Oct. 8, 1942, p. 8. For the earlier remarks of Churchill and Roosevelt, see Churchill's declaration of policy of June 22, 1941 (*New York Times*, June 23, 1941, p. 8); statement of the President of Aug. 21, 1942, endorsing the London resolution (*Department of State Bulletin*, Aug. 22, 1942, Vol. VII, p. 709), and statement by the President of Oct. 8, 1942, concerning a United Nations Commission to Investigate War Crimes (*ibid.*, Oct. 10, 1942, Vol. VII, p. 797). The latter, for example, refers to extradition of Axis war criminals at the conclusion of the war, which may mean provisions in an armistice or in a peace.

¹⁰⁴ *Inter-Allied Review*, Oct., 1942, Vol. II, No. 10, p. 236.

court.¹⁰⁵ Only one writer, Sir George Young, deeming the formal departure from tradition established by the penal clauses to have been legally defective as well as politically unwise, rejects outright any war crime trials unless they take place in the national tribunals of the accused.¹⁰⁶

From the strict legal point of view, it is submitted, the suggestions made by the Lords offer a solution to the problem of retribution of war crimes which is recognized by the present law of war. According to this law, belligerents, during hostilities and before their formal termination, have a concurrent jurisdiction over war crimes committed by captured enemy persons in their territory or against their nationals in time of war. Belligerents during war may, therefore, legitimately try and punish every enemy person charged with such an infraction of the rules of warfare, provided that the accused has been taken prisoner of war and that he is judged according to the law and procedure in force in the armed services of the captor, and provided, further, that the accused cannot plead act of state or superior orders and that the act itself has been condemned as a penal offense prior to its commission by legislation patterned on the generally accepted laws and customs of war. It was, therefore, correct legal procedure to suggest, as the Lord Chancellor did, that the armistice agreement shall contain provisions for the surrender of Axis war criminals for *inter bellum* trials in United Nations courts before the formal termination of war. Whether or not such post-armistice, not postwar, proceedings may take place, as the Lord Chancellor queried, in the civil or military tribunals of Allied countries, and whether the persons charged may be tried in mixed or in a combined United Nations court or courts, would seem to be a matter of municipal law and procedure, conditioned, however, by the requirement of national treatment which the law of war stipulates with regard to prisoners of war.

The decision to institute post-armistice proceedings against enemy nationals charged with criminal acts of violence contrary to the laws and customs of war in the courts of enemy States is, of necessity, an act of high international policy and not a question of law. Nevertheless, such an act, based on and circumscribed in its execution by hitherto generally accepted principles of law, may tend to inculcate respect for law in time of war and in time of peace. Eventually such an act, constituting at present as much a departure from the traditions of earlier armistices as the penal clauses of 1919-1920 did with respect to earlier peace settlements, may prove a step toward the realization of projects calling for a permanent international criminal jurisdiction functioning on the basis of an independent international penal law.¹⁰⁷ For the present, however, solutions to the problem of retribu-

¹⁰⁵ See the writers cited *supra*, n. 101.

¹⁰⁶ "War Criminals," *Contemp. Rev.*, Aug., 1942, p. 77 ff. Cf. also Viscount Cecil, "The War and After," *ibid.*, Dec., 1942, p. 322, not sharing this view.

¹⁰⁷ In 1902, the Terms of Surrender of the Boer Forces in the Field included provisions for

tion for war crimes, other than national postwar trials or post-armistice proceedings in enemy municipal courts, either rest on the uncertain precedent established by the treaties of peace of 1919-1920 or constitute propositions *de lege ferenda* which are as much outside the province of law as is the decision to exact such retribution in enemy tribunals after actual hostilities have ceased.

the trial in British courts martial immediately after the close of hostilities of "certain acts, contrary to usages of war, which have been notified by the Commander-in-Chief to the Boer Generals." Oppenheim, *op. cit.*, II, p. 481, n. 3. There is, however, no certainty concerning the nature of this agreement, though it is generally described as a peace arrangement deviating from the norm by virtue of this clause. See Simon, *loc. cit.*, p. 261, quoting Despagnet. Perhaps the agreement was merely a conditioned "unconditional surrender" since the Boers had ceased to be an independent State at the time of signing the terms.

PRINCIPLES OF INTERNATIONAL CONTROL OF NARCOTIC DRUGS

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The fact is not very widely known that the League of Nations and governments acting in coöperation during a period of just over twenty years between the two world wars have built up an effective international drug administration spanning the entire world. It may perhaps be said that the general public has come to realize that a useful piece of work has been and is being done with good results, but only a few specialists know the main principles on which international coöperation in regard to narcotic drugs is based; and perhaps still fewer have any knowledge of the fact that to make possible effective control of narcotics it was necessary to create special international machinery with wide powers of supervision, regulation, and even sanctions. It should be mentioned at the outset that this international administration has survived the onslaught of the present world crisis which proved fatal to many other efforts in international coöperation. This signifies that the governments of countries of the free peoples of the world have maintained national control of drugs and have continued their coöperation with each other and with the League of Nations and the international drug organs. A proof of this is the fact that in January, 1943, one of these organs—the Supervisory Body—had received from governments of all the free countries in the world except one, Liberia, the estimates of the drug requirements for 1943 which governments are required to furnish under the terms of one of the drug conventions.

One of the principal reasons for the survival of this work is the fact that through a series of international conventions which have reached virtually universal ratification governments have accepted definite obligations and have agreed to submit to specific international supervision. The other main reason is that the international coöperation for the supervision of drugs has proved its usefulness and actually been found to be indispensable. For the purpose of international drug control is to protect humanity against the evil of drug addiction, and early in this century experience had already shown that no country was able to protect its people against this evil by its own isolated actions. The drug smuggler has no respect for national frontiers. The world is his market, and he goes wherever he finds his profits. At the end of the first world war governments understood that only concerted international action could bring any hope of eradicating drug smuggling or reducing it to a minimum and thereby gradually eliminating drug addiction as a social evil. The League of Nations became the general staff in the world war against the drug evil through Article 23(c) of the Covenant of the League.

We shall now study in some detail the main features of the international drug administration as it stands today without devoting space to the historical development which in itself is an interesting study of international legislation.

As already said, the main object was and is to protect humanity against drug addiction. The principal methods used towards achieving this goal have been the following:

1. Limitation of available supplies of drugs to the medical and scientific requirements of the world. It is evident that there is a dual aspect here, namely: (1) limitation of world supplies through limitation of world manufacture; and (2) limitation of supplies available to each country and territory.
2. Supervision of supplies of raw materials and drugs in each territorial unit, *e.g.*, of manufacture and wholesale and retail trade.
3. Regulation and supervision of the movement of raw materials and drugs across frontiers, *e.g.*, of imports and exports (international trade).
4. Special and general international supervision of the application of the drug conventions in each country and territory.

The reader will note that in points 2 and 3 the reference is to raw materials and drugs, whereas in point 1 raw materials are not mentioned. The explanation of this is that the limitation of the production of raw materials has not yet been achieved, although a preliminary draft convention for the limitation of the production of raw opium had been drawn up by the League of Nations in 1939 and submitted to governments before the war broke out in Europe. Therefore, the position as to raw materials is that there is as yet no effective limitation, either of world production or of the quantities which may be used in each territorial unit; but in other respects the raw materials are subjected to the same international and national supervision as the drugs themselves.

Before we consider in detail the main features of the international control system, it is necessary to make a short historical digression. The system has been developed by the empirical method. The League of Nations could not advance quicker or further than governments and public opinion were prepared to go. And they were not prepared to go the whole way at once. Another difficulty was that when the League took up this work in 1920 there was very little knowledge of the drug problem, its different aspects, and its magnitude. The League had to proceed slowly and gradually, attacking the most important problems first. The various important steps were marked by different conventions concluded one after the other. Thus the first step provided for the supervision and control of the domestic field (The Hague Convention of 1912; pre-League).¹ The second step was accomplished by the Geneva International Drug Convention of 1925 which regulated the

¹ For text of the Convention, see this JOURNAL, Supp., Vol. 6 (1912), p. 177. See articles by Hamilton Wright, this JOURNAL, Vol. 3 (1909), pp. 648, 828, Vol. 6 (1912), p. 865, Vol. 7 (1913), p. 108.

international trade; and the third, through the 1931 Limitation Convention, brought about limitation of world manufacture of drugs and limitation of the supplies in each territorial unit.²

LIMITATION OF DRUG SUPPLIES

The limitation of world manufacture and the limitation of world drug supplies are reached through the limitation of the supplies of each territorial unit. The 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs³ accomplished this through a system of obligatory and binding estimates of drug requirements furnished by governments and which are examined by a special international body set up by the Convention—the Supervisory Body (see the 1931 Convention, Chapter II, Estimates, Articles 2–5). The convention states that each high contracting party shall furnish annually estimates of the requirements of each of the drugs covered by the convention (all narcotic drugs known to have been in use on July 13, 1931) for each of its territories to which the convention applies. These estimates, so far as they relate to drugs required for domestic consumption, must be based solely on the medical and scientific requirements of the country or territory (see Article 4, paragraph 7).

It was clear to the conference which drew up this convention that limitation of manufacture and of supplies to the world's medical and scientific needs made a universal application of the estimate system imperative. It had to cover the whole world. Limitation could never be effective if there were parts of the world to which the estimate system did not apply. Two possible contingencies had to be foreseen and provided for. The first was that there was no certainty that the convention would be ratified by all countries and that ratification would include colonial territories, protectorates, and mandated territories. In fact the 1931 Convention contains the usual so-called "colonial article" (Article 26) which makes it possible for a government, at the time of signature, ratification, or accession, to exempt from the application of the convention some or all of its colonial territories, etc. This contingency was met by Article 2, paragraph 3, which placed upon one of the international drug bodies—the Permanent Central Board which is referred to later—the duty of requesting that estimates for countries and territories to which the convention does *not* apply be furnished in accordance with the provisions of the convention.

We meet here for the first time a rather unusual feature which is a novelty in international legislation. Non-parties to a convention are requested to perform a certain act although they have not undertaken an obligation to do so. But the convention goes even further because it is so constituted that

² For texts of the Conventions of 1925 and 1931, see this JOURNAL, Supp., Vol. 23 (1929), p. 135, and Vol. 28 (1934), p. 21. See also articles in this JOURNAL by J. A. Starke, Vol. 31 (1937), p. 31, and Q. Wright, Vol. 18 (1924), p. 281, Vol. 28 (1934), p. 475.

³ See League of Nations Document C.455.M.193.1931.XI.

States are subject to the effects of the convention and to the limitation whether they are parties to the convention or not. This will be explained later in detail.

The second of the two contingencies which had to be provided for was that there could be no guarantee that parties to the convention or non-parties would furnish each year the estimates they had undertaken or been asked to furnish. This contingency is met by the stipulations of Article 2, paragraphs 2 and 3, under which the Supervisory Body shall itself, so far as possible, furnish estimates for countries which do not do so themselves, whether they are parties to the convention or not. The convention defines estimates as denoting estimates furnished in accordance with Articles 2 to 5 and thus including estimates furnished by the Supervisory Body. In other words, all stipulations of the convention which refer to or are based on estimates apply with equal force to estimates furnished by governments and to those furnished by the Supervisory Body. As all estimates are binding on governments, *i.e.*, must *not* be exceeded, it follows that governments are also bound by estimates which they have *not* furnished themselves but which have been made for them by the Supervisory Body; and this is the case whether the government concerned is a party to the convention or not. This is probably the most radical feature of the convention. By becoming a party, a State has agreed to be bound by estimates furnished for it by the Supervisory Body if it should fail to furnish its own estimates; but non-parties, who have accepted no obligations whatsoever, are nevertheless limited in their drug supplies by the estimates made by the Supervisory Body under the same conditions. It should be mentioned, however, that a country which has not become a party and which manufactures its own drugs may escape the effects of the convention as long as limitation of raw materials has not been achieved.

Estimates are furnished in advance of the calendar year to which they apply. For instance, in respect of 1943 they should be furnished by August 1, 1942. It is, of course, difficult to estimate drug requirements accurately so far in advance. The needs may be miscalculated or circumstances may arise which increase the drug requirements during the course of the year. To meet this contingency, the convention entitles governments to furnish supplementary estimates during the year. (See Article 3.) Supplementary estimates are also subject to examination by the Supervisory Body and have in all respects the same effects as the regular annual estimates.

An estimate may, and in fact as a rule does, contain several amounts. It is not possible here to go into technical details regarding the different items which make up an estimate; but in order to explain the mechanism of the Convention, it is necessary to give a list of the various items which may be included in an estimate for each of the various drugs (Article 5, paragraph 2). These are:

1. The quantity necessary for domestic consumption;

2. The quantity necessary for conversion⁴ into other drugs whether for domestic consumption or for export;

3. The amount of reserve stocks⁵ which it is desired to maintain;

4. The quantity required for the establishment and maintenance of government stocks.⁶

Amounts referred to under points 3 and 4 above are either plus or minus quantities depending on whether stocks in hand at the beginning of the year are lower or higher than the levels which the government desires to maintain.

The global quantity of any narcotic drug which a country may possess and use in any year is called the "Total of the Estimates" (Article 5, paragraph 2). If statistics show that the "Total of the Estimates" has been exceeded, the convention has been violated. The "Total of the Estimates," which is thus of great importance, is composed of the various amounts mentioned under 1 and 2 above with the addition or deduction as the case may be of any amounts included under points 3 and 4.

In connection with estimates for domestic consumption and for conversion purposes and also in the definition of reserve stocks, mention is made of drugs for export purposes. In principle, estimates are *not* to be calculated to include quantities intended for exports (or re-exports) for the simple reason that these quantities are included in the estimates of the importing countries. It proved necessary, however, to make certain exceptions. There are a large number of preparations which contain narcotic drugs in such small quantities that they cannot be abused and therefore need not be under special national or international supervision. The estimates of importing countries do not include such preparations; but as narcotic drugs are used for their manufacture, the manufacturing country must provide in its consumption estimates, estimates for the quantities of drugs necessary for the manufacture of such preparations whether intended for domestic consumption or for exports.

Conversion estimates may also contain an export element. The importing countries estimate their needs of the drug resulting from the conversion, but the manufacturing country must obviously cover in its estimates the required quantities of the mother substance.

Finally, the reserve stocks may contain a reserve for export purposes.

⁴ The 1931 Convention defines conversion as follows: "the term 'conversion' shall denote the transformation of a drug by a chemical process with the exception of the transformation of alkaloids into their salts."

⁵ The convention defines the term reserve stocks as follows: "The term 'reserve stocks' in relation to any of the drugs shall denote the stocks required (i) for the normal domestic consumption of the country or territory in which they are maintained, (ii) for conversion in that country or territory, and (iii) for export."

⁶ The convention defines the term government stocks as follows: "The term 'government stocks' in relation to any of the drugs shall denote stocks kept under government control for the use of the government and to meet exceptional circumstances."

This was necessary for practical purposes so that export orders may be effected without waiting for the manufacture of the required amounts.

With these exceptions, there are no export elements in the estimates, nor do quantities which are shown as having been exported count against the estimates of the exporting country in the international accounting, the purpose of which is to establish whether or not estimates have been exceeded. But exported quantities count as imports against the estimates of the importing country.

This system of estimates, combined with the special double check of the international trade referred to later, proved completely satisfactory and in fact eliminated escape of drugs into the illicit traffic from the regular international trade which in the past was the main source of supplies for drug smugglers.

Estimates are furnished by governments to an international body—the Permanent Central Board—which, however, has no other function in regard to estimates at this stage except to hand them over to another body—the Supervisory Body—for examination in accordance with the terms of the Convention (Article 5, paragraph 6). The Supervisory Body was set up by the 1931 Convention and consists of four persons, one each appointed by the Opium Advisory and the Health Committees of the League of Nations, the Permanent Central Board, and the International Health Office at Paris.

The convention does not explicitly state the purposes of the examination of estimates by the Supervisory Body, but there is no doubt that the purpose is the same as that of the convention as a whole, namely, the limitation to the medical and scientific needs of narcotic drug supplies in each country and territory, and also indirectly the limitation of world manufacture. It has already been mentioned that estimates of drugs required for domestic consumption must be based solely on the medical and scientific requirements of the country which furnishes the estimates.

The main task of the Supervisory Body is to prevent over-estimation. The means at its disposal, which *prima facie* may appear rather weak, consist of demands addressed to governments for further information and details in order to make the estimate complete or to explain any statement made therein; and the Supervisory Body may, with the consent of the government, amend the estimates. In other words, in principle governments are themselves masters of their estimates. However, the convention requires that governments should furnish with the annual estimates a statement explaining the method by which the several amounts included in the estimates have been calculated (Article 5, paragraph 3). Similarly any supplementary estimate which a government submits must be accompanied by an explanation of the circumstances which necessitate the estimate (Article 3). The Supervisory Body is entitled to expect these statements or explanations from governments before it undertakes the examination of any estimate, and it may refuse to examine an estimate in the absence of the statement or explanation required by the convention.

If the Supervisory Body should consider estimates too high, it may and often has suggested reduction of estimates. The government may refuse; but in that case the convention gives the Supervisory Body the right to publish the correspondence together with its own observations. The estimate system has been in force from January 1, 1934, and the Supervisory Body has not yet found it necessary to make use of its right to publish correspondence with governments. In most cases governments have accepted the Supervisory Body's suggestions for reductions or amendments of estimates. The few cases in which governments have maintained their original estimates have not been sufficiently important to cause the Supervisory Body to use the publicity weapon. During the first few years, there was considerable over-estimation, particularly of morphine required for conversion into codeine; but this was due to lack of experience and understanding of the working of the estimate system.

When the estimates have been examined they are included in the Supervisory Body's Annual Statement on World Requirements of Dangerous (Narcotic) Drugs, which is communicated by the Secretary-General of the League of Nations to all governments and later made public. Supplementary estimates are included in supplementary statements. These statements form the keystone of the scheme of limitation of manufacture and supplies and of the national and international supervision of the whole drug industry (manufacture, domestic trade, consumption, stocks, imports and exports). They determine the outside limit of drug supplies which may be available to each country and territory, and also the maximum quantities of drugs which may be manufactured in the world. The Annual Statements⁷ contain estimates for every single country or territorial unit which exists—in all 177. A simple addition of all the "Totals of the Estimates" gives for each drug the maximum world requirements in each year.

It happens, of course, that less drugs are needed than are estimated. Such a situation is automatically taken care of by the stock provisions. Any quantities not used at the end of the year are accounted for as stocks in hand and automatically reduce the estimates for the following year. On the suggestion of the Supervisory Body, stock estimates are furnished as supplementary estimates after the beginning of the year, *i.e.*, when the stocks on hand at the end of the preceding year have been ascertained.

We will now consider the provisions of the 1931 Convention which contain the obligations of governments not to exceed the estimates. There are only two sources of supply for narcotic drugs: manufacture and imports. Articles 6 and 7 deal with limitation of manufacture and Article 12 with limitation of imports.

⁷ The Statement for 1943 is contained in League of Nations Document C.82.M.82.1942.XI issued under the following title: Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of July 13, 1931; Estimated World Requirements of Dangerous Drugs in 1943; Statement issued by the Supervisory Body under Article 5.

By Article 6 governments undertake not to manufacture in any year greater quantities than the total of the following quantities:

1. The quantity required within the limits of the estimates for domestic consumption;
2. The quantity required within the limits of the estimates for conversion;
3. Such quantity as may be required during the year for the execution of export orders;
4. The quantities, if any, required for the purpose of replenishing reserve and government stocks.

However, a manufacturing country may also import drugs, and Article 7 lays down that any quantity imported during the year must be deducted from the total amount the manufacture of which is permitted. Deduction must also be made for drugs seized in the illicit traffic and utilized for domestic consumption or for conversion.

It is evident that it is not always easy to regulate manufacture so as to avoid excesses, particularly in the large manufacturing countries which have an important export trade. The convention foresees such possibilities and provides that any excess manufacture shall be deducted from the amount to be manufactured during the next year, and also provides that in their annual statistics governments must give the reasons for the excess. In practice, no deductions are operated on the quantities to be manufactured the following year. Excess manufacture goes into reserve stocks, and the effect is an automatic reduction of the "Total of the Estimates" which in fact reduces the quantity which may be manufactured during the year after that in which the excess occurred.

As to imports, Article 12 provides that the imports in any year shall not exceed the "Total of the Estimates" plus the quantities exported and after deductions of any quantity manufactured in the country concerned during the year.

It should be noted that, as will be explained later, both limitation of manufacture and limitation of imports are the subject of strict international supervision on the basis of statistics furnished by governments to the Permanent Central Board and checked by the Board against the estimates examined by the Supervisory Body.

The next point which should be considered is the method by which world manufacture is limited. There are no special provisions in the 1931 Convention because limitation of world manufacture follows automatically by the application of the estimate system. (The only reference in the convention to limitation of world manufacture occurs in the preamble, which states that one of the objects of the convention is the limitation by international agreement of the manufacture of drugs to the world's legitimate requirements for medical and scientific purposes). All drug requirements are covered by estimates, whether they refer to consumption, conversion, and stocks, or whether they refer to manufacturing or importing countries. Manufacture

in any one country must remain within the limits of the estimates for that country, plus manufacture to meet export orders which in their turn are covered by the estimates of the importing country. The mechanism of the estimate system thus prevents any manufacture in excess of the total world needs as established by estimates. Demands fluctuate during the course of the year and from year to year, but the stock provisions of the Convention provide the necessary regulator. The immediate effect of the 1931 Convention was to reduce world manufacture very considerably; and up to the beginning of the second world war in 1939, world manufacture corresponded very closely to the world's medical and scientific requirements.

It has happened that world requirements in one year exceeded world manufacture. The result was a depletion of world stocks at the end of the year, but the stocks were reconstituted in the following year by increased manufacture within the limits of the estimates.

INTERNAL CONTROL OF MANUFACTURED DRUGS

The various drug conventions contain general principles for the domestic control of narcotic drugs and of the raw materials for their manufacture. The first, and perhaps the most important, principle is the obligation of the parties to the convention to require that anybody, whether individuals or juridical firms, who handles drugs in his business or profession shall obtain official licenses or permits for that purpose. In other words, manufacture, trade (including import and export trade), wholesale and retail distribution must not be undertaken except by specially authorized persons. Secondly, the Convention requires all persons authorized to engage in operations involving these substances to keep complete accounts of all transactions in drugs. Retailers (*i.e.*, pharmacists, doctors, and hospitals) are not required by the conventions to keep such special accounts showing the disposal of narcotic drugs, but they must file and preserve all medical prescriptions issued or filled by them. The relevant provisions are found in Article 6 of the Hague Convention of 1912 and Article 6 of the Geneva Opium Convention of 1925.⁸

The conventions are less strict in regard to internal control of raw materials for the manufacture of drugs. Article 2 of the Geneva Convention of 1925 stipulates that laws and regulations shall be enacted to ensure effective control of the production, distribution, and export of raw opium; but the only obligation to limit operations in raw materials to authorized persons devolves from Article 5 of the Hague Convention which provides that import and export of raw opium shall be restricted to duly authorized persons. The conventions do not contain any similar provisions in regard to internal control of coca leaves from which cocaine is manufactured. The explana-

⁸ See League of Nations Documents O. C. 1 (1), dated April 3, 1923, International Opium Convention signed at The Hague, Jan. 23, 1912, and C.88.M.44.1925.XI, Second Opium Conference, Convention, Protocol, Final Act signed at Geneva on Feb. 19, 1925.

tion of this weaker control of raw materials is that in 1912 and 1925 they were not considered as dangerous as the manufactured drugs. The 1931 Convention, the main purpose of which was to limit manufacture, did not regulate raw materials except those in the possession of drug manufacturers.

In any country where drug control is well organized and administered, and this is the case in many countries, the measures of internal control go beyond the provisions of the conventions. Some such measures may be mentioned here. In some countries all transactions in drugs and raw materials have to be made on special order forms issued by the authorities. Copies have to be sent to the controlling authority. In most countries, wholesalers have to send periodical reports to the authorities who have at their disposal specially trained inspectors. These visit manufacturers, wholesalers, doctors, hospitals, pharmacists, etc., regularly or at intervals by surprise and undertake complete checks of all drug transactions on the basis of the periodical reports and remaining stocks. There are some countries which require medical prescriptions to be made on forms with serial numbers supplied by the authorities.

The 1931 Convention prescribes much more specific rules for internal control in one case—the control of drug factories. Governments are under an obligation to prevent excessive accumulation of raw materials in the possession of manufacturers (Article 16, paragraph 2). Normally a manufacturer may not have at any time more raw materials than are required for six months' manufacture. Exceptionally, additional quantities may be permitted after due investigation by the government, but in no case may the raw materials exceed one year's supply. It should be noted that this article does not in any way restrict the quantities of raw materials available in the country as a whole, but only those possessed by each manufacturer.

The first paragraph of Article 16 requires governments to exercise a strict supervision over the drug factories, and specifies that this supervision should cover supplies of raw materials, quantities of drugs and preparations manufactured and the disposal of all drugs and preparations. Article 17 indicates one of the methods for the supervision of factories, namely, the furnishing by the factories to governments of quarterly reports which must show all raw materials and drugs received in the factory, the quantities of drugs or any other products produced from raw materials and drugs, the quantities of products disposed of, and finally the quantities of raw materials, drugs, and other products remaining in stock at the end of the quarter. Further, drug manufacturers must state in the quarterly reports the alkaloid content of all raw materials received as determined by a method prescribed by the government and under conditions considered satisfactory by the government. This last provision is indispensable for any effective control of drug manufacture because the morphine content of raw opium used for the manufacture of drugs may vary between 12 per cent and 16 per cent or even higher in some cases. Through a special committee of experts, the League

of Nations has elaborated standard methods for ascertaining the morphine content of opium and the ecgonine content of the coca leaf; but these standardized methods had not been generally adopted by governments when war broke out in Europe in 1939 and interrupted this special work. A number of countries, however, have introduced the League of Nations' methods into their pharmacopœias.

Another method for the control of drug factories is that of inspection and checking of the quarterly reports with factory records and stocks. Inspection is not mentioned in the convention, but follows logically from Articles 16 and 17 in their relation to each other. The quarterly reports received from the factories cannot be said to constitute strict supervision. Something more is required, and that is the verification of the quarterly reports in the factories, *i.e.*, inspection.

The internal control thus consists of an unbroken chain of records checked by inspections from the moment raw materials and drugs enter the country until the drugs are consumed in the form of medicine on medical prescriptions, and, furthermore, only specially authorized persons or firms are allowed by law to handle these dangerous substances. The position is the same for drugs which are exported. Exports may only be undertaken by licensed persons; and, as we shall see in a moment, no exports can take place without a special export permit issued by the government.

CONTROL OF INTERNATIONAL TRADE

During the period preceding the adoption of the League system of drug conventions, the international trade was the principal source of supply for the illicit drug traffickers and was thus the most serious and urgent problem which confronted the League of Nations at the outset. Governments were usually aware of the necessity of protecting their own peoples against the drug evil and had national legislation which provided some control of the domestic trade. But governments in some countries which had prosperous drug industries were not alive to the necessity of protecting other peoples from drugs exported from their own territories. A steady stream of drugs went into the illicit traffic from authorized drug factories in continental Europe and reached all parts of the world. Putting a stop to this situation was one of the first tasks which the League of Nations accomplished with complete success. Strict control of the international trade was one of the principal achievements of the Geneva International Drug Convention of 1925 which came into force towards the end of 1928 (see Chapter V, Articles 12-18). The international trade is now under effective supervision through the system of import and export certificates. The principles on which this supervision is based are the following: Narcotic drugs and the raw materials from which drugs are obtained are dangerous substances. Therefore, no country is entitled to ship such substances to another country without the knowledge and express consent of the country of destination. The

main features of the import and export certificate system are described below.

The import and export of drugs and raw materials must be forbidden by law except under special license; in other words, the government must have complete control over the import and export trade (see Article 12 and Article 13, paragraph 1). No government may issue an export license without having in its possession a certificate issued by the government of the importing country stating that the importation of a specific quantity by a specified importer from a specified exporter is authorized (import certificate, see Article 13, paragraph 2). The export license or authorization should state the number and date of the import certificate and the authority by whom it has been issued. The import certificate is usually delivered to the importer, sent by him to the exporter, who attaches the import certificate to his application for an export authorization or export license. A copy of the export authorization must always accompany the shipment, and the convention requires the government to send another copy to the government of the importing country (Article 13, paragraph 4). When the shipment has arrived in the country of destination, the copy of the export authorization in the hands of the government of the importing country should be returned to the government of the exporting country with an endorsement indicating the amounts actually imported (Article 13, paragraph 5).

The 1925 Conference annexed to the convention a model form of import certificate which the parties to the convention have agreed to adopt so far as possible. The form contains more than actually required by Article 12, namely, a statement by the government of the importing country that it is satisfied that the drugs covered by the import certificate are required solely for medicinal or scientific purposes. If the certificate covers raw materials, the statement is to the effect that they are required for legitimate purposes.

The 1925 Convention prescribes a number of detailed rules for the application of the system of import certificates and export authorizations. These rules refer to the information to be stated in the certificates, the time limit for their validity, special provisions for transit and transshipment, for diversion of a shipment from one destination to another, for bonded warehouses, and for free ports and free zones. For further details, reference is made to special studies of the subject published by the League of Nations.⁹

We have shown earlier that the internal control rests upon an unbroken chain of records, and now that the supervision of the international trade is based upon a chain of certificates exchanged between the governments concerned. The substances which we are dealing with here are moving from one country to another protected by governmental documents and actually under the watchful observation of authorities. The international

⁹ Studies and Documents regarding the Working of the System of Import Certificates and Export Authorizations, Document No. C.434.M.225.1935.XI, dated Nov. 2, 1935, and C.268.M.185.1939.XI, dated Sept. 28, 1939, and corrigenda.

legislator, however, did not consider this enough. He added an international supervision and check as a further protection for society as a whole. This will be dealt with under the next heading.

The results of the system of import certificates and export authorizations have been excellent. It is a fact that the regular international trade has ceased to be a source of supply for the illicit traffic. It may sound strange to state this as an excellent result; but it cannot be denied that before the system was introduced many countries by omission or commission contributed huge quantities of narcotic substances to the illicit traffic. The watertight system of certificates, combined with the international supervision, has created not only order where there was chaos but also a sense of responsibility on the part of the competent authorities. The publicity given to international collaboration, together with the strict rules prescribed by the conventions, left no doubt that carelessness or negligence in dealing with the international movement of drugs constitutes a serious offense against humanity.

INTERNATIONAL SUPERVISION OF THE APPLICATION OF THE DRUG CONVENTIONS

Some reference has already been made to the question which is the subject matter of this section. It was not considered sufficient to place upon governments certain obligations through the conventions. International supervision of the fulfillment of these obligations was deemed necessary. It must be remembered that the underlying motive of the international legislator was the desire to protect mankind as a whole and the various peoples against the drug evil. Administration in the different countries was necessarily on widely different levels of development and efficiency. The possibility of a State engaging in the nefarious illicit drug traffic could not *a priori* be excluded. This possibility later materialized in one flagrant case. The principal reason for the creation of international machinery of supervision was, however, the realization that an effective campaign against the drug evil could only be undertaken by coöperation between all governments. The illicit drug traffic was on an international scale with international ramifications. It could only be combatted by concerted international action. The international supervision falls into two groups: the first being a general supervision of the application of the conventions as a whole by the League of Nations in coöperation with governments; and the second being a specific supervision (on the basis of estimates and statistics furnished by governments) exercised by the Permanent Central Board which was set up by the Geneva Convention of 1925.

The fundamental law concerning the general supervision is contained in Article 23 of the Covenant of the League which reads as follows:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League: . . . (c) will entrust the League with the general supervision over the execution of agreements with regard to . . . the traffic in opium and other dangerous drugs.

The League did not delay its action. The First Assembly (1920) took the first steps by creating the Advisory Committee on Traffic in Opium and Other Dangerous Drugs and by entrusting the Secretariat of the League with certain important tasks.

The mandate of the Opium Advisory Committee was stated in the following terms in a resolution adopted by the First Assembly:

That, having regard to the duty placed on the League by Article 23 of the Covenant to supervise the execution of arrangements with regard to the traffic in opium and other dangerous drugs, the Assembly concurs with the Netherlands Government in its view that it will be preferable for the League to undertake the duties placed upon the Netherlands Government by the Opium Convention¹⁰ with regard to the collection of data and dealing with disputes;

That for this purpose and for the purpose of enabling the League to exercise its general supervision over the execution of arrangements with regard to this traffic, the Secretariat of the League is entrusted with the duty of collecting information as to the arrangements made in the various countries for carrying out the Opium Convention, the production, distribution, and consumption of the drugs;

That, in order to secure the fullest possible coöperation between the various countries in regard to the matter, and to assist and advise the Council in dealing with any questions that may arise, an Advisory Committee be appointed by the Council which shall include representatives of the countries chiefly concerned, in particular Holland, Great Britain, France, India, Japan, China, Siam, Portugal, and shall, subject to the general directions of the Council meet at such times as may be found desirable;

That, in view of the importance of the coöperation of States which have ratified or may hereafter ratify the Opium Convention, but which are not yet members of the League, the Netherlands Government be requested to invite their concurrence and coöperation in the arrangements indicated above, and that, in the event of such concurrence being given, the Council be authorized to add to the Advisory Committee, in the capacity of member or assessor, a representative of any such country which is specially concerned in the traffic, and that a special invitation be addressed to the United States of America;

That the Council be authorized, if and when they think it necessary, to add as assessors to the Committee not more than three persons not representatives of governments, having special knowledge of the question; and that the travelling expenses and allowances of such members shall be paid out of the funds of the League;

That the Advisory Committee shall, three months before the beginning of every session of the Assembly, present to the Council for submission to the Assembly, a report on all matters regarding the execution of agreements with regard to the traffic in opium and other dangerous drugs. . . .

The task given the League was of the widest possible nature, and the League gave its Advisory Committee an equally wide field of activity. The competence of the Advisory Committee in the drug field suffers no limita-

¹⁰ The Hague Convention of 1912.

tions except in so far as specific tasks have been given by the conventions to the other two international drug organs—the Supervisory Body and the Permanent Central Board. The Advisory Committee even may and does regularly survey the activities of the Supervisory Body and the Permanent Central Board. As the name indicates, the Committee is an advisory organ—advising the Council of the League. This means that all its decisions, recommendations, and proposals are subject to the approval of the Council before they can be communicated to governments. The Committee submits a report to the Council, on the work of each session; and when the report has been adopted by the Council, the decisions are executed by the Secretary-General of the League in the names of the Committee and of the Council. The Committee can take any initiative it considers necessary, subject always to the approval of the Council. The Council and the Assembly also have the right of initiative which takes the form of instructions to the Advisory Committee. Neither the Council nor the Assembly will make any major decisions affecting the drug questions without having obtained the advice of the Committee.

It is not the purpose of this article to trace the development of the constitution, functioning, and work of the Opium Advisory Committee through the 22 years of its existence. Suffice it to say that the Committee is a governmental committee, *i.e.*, composed of representatives of governments. The Council invites governments to become members of the Committee, and governments appoint their own representatives. When first appointed in 1920, the Committee was composed of eight members; when war broke out in 1939, not less than 23 governments were represented on the Committee. The Council has stated that its policy was to allow any government which so desired to participate in the work of the Committee. Several governments have been added to the Committee at their own requests.

The work of the Committee may be described under the following different headings:

1. *Policy-making organ.* As matters developed, the Committee has become the principal policy-making organ of the League in the drug field. It has in one way or another prepared all international conferences in this field held by the League. This means that the Committee has devised the plans for solving the complex problems involved in the opium question. The preparation has included, in the first place, initiative and suggestions; in the second place, drawing up the main lines of principles to be adopted; and finally the preparation of draft conventions submitted to international conferences. This was a logical development as the Committee came into possession of vast documentary material and gained valuable experience. It has included among its members a series of the world's most prominent experts on the drug problem. In its work the Committee has always followed the method of careful fact-finding and meticulous preparations, including close contact with governments and with public opinion. Here lies the

secret of the undoubted success which the Committee has had. In the early days, the Committee was surrounded by a great deal of suspicion; and violent storms raged both inside and outside the Committee. These storms have now abated. The Committee, with its planned course, calmly and deliberately attacked and solved one problem after another. It has had to follow an empirical method because, as already mentioned, it could advance no further than governments and public opinion were prepared to follow. One of its greatest achievements is that it has been able to find the middle road, the common denominator for a problem presenting many different aspects and many different interests in the various countries. The middle road has proved to be the road to success and has led to universal support by governments and universal application of the conventions.

As to the universal application of the conventions, it has already been said that the estimate system is in force for all parts of the world. There are today only three countries which have not become parties to any of the drug conventions. They are Argentina, Ethiopia and Liberia, which countries, however, generally apply the conventions although under no obligation to do so and which also closely collaborate with the League.

2. *General supervision of the application of the conventions.* Governments are required to communicate to each other through the Secretary-General of the League annual reports on the working of the 1931 Convention in their territories and also the laws and regulations promulgated to give effect to the conventions. All this material is communicated to all governments and to the Advisory Committee and forms the basis for the Committee's general supervision of the application of the conventions. The 1931 Convention states that the annual reports shall be in accordance with a form drawn up by the Opium Advisory Committee.¹¹ This is an interesting provision because it lays in the hands of the Advisory Committee the decision as to what information governments should supply. In practice, the Committee often requests governments to supply additional information within the frame of the form of annual reports. The annual reports are carefully scrutinized and discussed by the Advisory Committee at its annual sessions. If the Committee should not be satisfied by a particular report, it may instruct the secretariat to obtain further information or to communicate to the government the observations of the Committee. In serious cases the Committee voices its conclusions in its report to the Council, which is communicated to all governments and which is available to the public. The Committee may also draw the attention of the Council to an unsatisfactory situation, and the Council may instruct the Secretary-General to ask the government concerned for explanations. On many occasions the Committee has adopted strongly worded resolutions concerning a government and asking for immediate effective measures to remedy an unsatisfactory state of affairs. Such resolutions are forwarded to the Council, noted by the Council, and then

¹¹ See League of Nations Document O. C. 1600, dated Jan. 14, 1935.

communicated to all governments, including the government named in the resolution. There is only one single government in the world which has persistently affronted the authority of the League in this field and refused to make amends.

The Committee has, however, with good effect used another method to make governments do their duty. Several governments have been invited by the Committee to attend a session to hear the Committee's accusations and to give explanations. No government has ever refused such an invitation. They have come and, again with the same single exception, invariably taken the necessary measures to satisfy the Committee. The Committee's most effective weapon in such cases, and indeed for all its activities, is and has been publicity. With few exceptions, the discussions take place in public and the accounts of its proceedings are public documents. The late Mr. Stuart J. Fuller, who for many years attended the meetings of the Advisory Committee on behalf of the Government of the U. S. A., has characterized the Committee as follows (in 1938):

The Opium Advisory Committee affords the one forum in the world where the problem of the illicit traffic in narcotic drugs can be and is publicly discussed and where any government whose territory has been used as a base for the illicit traffic may without fear or favor be publicly asked to account for its stewardship. Most of the progress made in the past ten years has been due to publicity and the value of this Committee as an instrument of publicity is widely recognized.

The laws and regulations transmitted by governments enable the Committee to make sure that the legislation which is required to give effect to the conventions is enacted. They also make it possible for the Committee to criticize legislation and object to it. A few years ago the Committee's criticism of a new decree led to its withdrawal by the government concerned. The reason for the objection to the decree was that it violated the fundamental principle of the conventions that drugs may only be used for medical and scientific purposes.

The communication of annual reports and laws and regulations to all governments is a measure of the greatest importance in two different ways: governments are informed of the situation in other countries, and they may learn from the experience of others.

It should not be thought that the Committee is only critical in its attitude towards governments. It often gives public praise where praise is due and cites measures taken in one country as examples for other countries.

The general supervision exercised by the Advisory Committee finds many different expressions both in special cases and of a general character. Thus suggestions have been made frequently for the improvement of internal control, for the perfection of the import certificate and export authorization systems, for controlling smuggling by ships and by aircraft. The Committee has elaborated model codes to the Conventions of 1925 and 1931 containing

practical advice as to the best methods to give effect to them. It has published a complete commentary to the 1931 Convention made by its secretariat,¹² and it has recommended to governments the adoption of standard rules for the control of pharmacies.

The Advisory Committee does its work at regular annual sessions either in full committee or in subcommittees which always report back to the Committee. The Committee elects among its members a chairman, a vice chairman, and annually a rapporteur for each session or for a specific question. The secretary of the Committee is the League official who is the Chief of the Drug Control Service of the Secretariat. Subcommittees are either standing or *ad hoc* subcommittees. The standing subcommittees are the following: The Subcommittee on Seizures and Illicit Traffic (see below); the Agenda Subcommittee, the Subcommittee on Cannabis (Indian Hemp, Marihuana), and the Subcommittee on the Situation in the Far East.

3. *Work in connection with the illicit traffic.* The illicit traffic was, from the outset, the greatest problem which faced governments. Traffickers were organized in international bands and carried on their traffic across frontiers and over the seas. The campaign against the illicit traffic became one of the more important tasks of the Opium Advisory Committee. The Committee has used different methods for this purpose.

In the first place it has arranged for the dissemination of complete information regarding important cases of illicit traffic to all governments and the national authorities concerned with the suppression of the illicit traffic. From the beginning, the Committee endeavored to obtain as much information as possible from governments, and Article 23 of the 1931 Convention made it an obligation for the parties to communicate to each other, through the Secretary-General of the League, as soon as possible, particulars of each case of illicit traffic discovered which might be of importance either because of the quantities involved or because of the light thrown on the sources from which drugs are obtained or the method employed by the traffickers. The article specifies the information to be given, and this information includes the quantity of drugs involved, their origin, marks and labels; the ports at which the drugs were diverted into the illicit traffic; details of how they were shipped, with names of ships, consignors, consignees, and forwarding agents; methods and routes used by smugglers; action taken against the smugglers, with penalties applied to them; and, finally, any other information which will assist in the suppression of the illicit traffic. All such reports received from governments are circulated by the Secretary-General to all governments and through them to police or other authorities who are responsible for the suppression of the illicit traffic. The reports are also summarized each

¹² See League of Nations Document C.191.M.136.1937.XI, Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of July 13, 1931. Historical and Technical study by the Opium Traffic Section of the Secretariat of the League of Nations, Geneva, October, 1937.

quarter into a printed document which is widely distributed by the League of Nations. The secretariat maintains a blacklist of smugglers from which police authorities can secure their records.

The material regarding the illicit traffic thus collected is fully used by the Opium Advisory Committee, which itself follows the development of the illicit traffic, studies methods used by traffickers, and suggests measures to prevent the illicit traffic. One of the standing subcommittees is entrusted with the exclusive task of studying the illicit traffic. Members of this subcommittee are experts who themselves are responsible for the suppression of the traffic in their countries. The subcommittee submits each year to the Committee a special report on the trends and the development of the illicit traffic, which is annexed to the Committee's report to the Council.

The combatting of the illicit traffic by international measures was deemed of such importance for the success of the campaign against the drug evil that in 1936 the League called a special conference to consider a special international treaty. The conference resulted in the Convention of 1936 for the Suppression of the Illicit Traffic.¹³ The main provisions of this convention are the following:

1. Governments undertake to punish severely those who commit illicit acts involving narcotic drugs. The punishment must include imprisonment.
2. The extradition of drug offenders is facilitated by special provisions.
3. Provisions are made to make it possible to punish traffickers who organize in one country illicit traffic directed towards another country.
4. Special police offices are to be created for the suppression of the illicit traffic and arrangements are to be made for coöperation between these police offices in the various countries.

The Convention of 1936 only came in force in 1939, just before the outbreak of war in Europe, and there is therefore as yet little experience of its application.

Through the activities of the League and through the 1936 Convention, illicit traffic in narcotic drugs has been made the subject of measures which have the force of international law. In other words, illicit drug trafficking is now an offense or crime penalized by international law.

SPECIAL INTERNATIONAL CONTROL OF THE APPLICATION OF THE CONVENTIONS

We have seen in some detail how the drug trade is regulated, how drug manufacture is limited, how drug requirements for each country are determined in advance, and finally how the League of Nations, through the Opium Advisory Committee, planned and constructed an international system of safeguards and supervision. The international legislator, however, did not stop here. In addition he created a special international control of the way in which governments lived up to their obligations under the conventions. In other words, it was found necessary to provide safeguards in case govern-

¹³ League of Nations Document C.286.M.174.1936.XI.

ments violated the international law and thus became a danger to the rest of the world. For this purpose a special international organ—the Permanent Central Opium Board—was set up by the 1925 Convention with special powers, which include the application of sanctions. We shall see below that in the 1925 Convention these safeguards were only recommendations to the parties to the convention, but that the 1931 Convention went much further and gave the Permanent Central Opium Board powers to apply appropriate sanctions against countries which do not respect the international law (embargo on further exports of drugs to such countries).

Under the 1925 Convention the task of the Central Board is to watch continuously the course of the international trade (Article 24, paragraph 1). When the 1931 Convention was drafted, the Board was given the additional task of seeing to it that governments do not exceed their estimates. In order to enable the Board to exercise its control, governments have undertaken to supply the Board with certain annual and quarterly statistical information which covers the whole field of movements of drugs and the raw materials for their manufacture. The quarterly statistics, which should be furnished within four weeks after the end of each quarter, cover imports and exports and must indicate the country of origin or destination.

The annual statistics refer to: (a) production of raw opium and coca leaves, (b) manufacture of drugs, (c) stocks, (d) consumption, and (e) drugs which have been seized on account of illicit import or export.

The annual statistics should be furnished within three months after the end of each year and within five months in respect of stocks. All statistics should be submitted in a manner indicated by the Board, which in practice means that the Board prepares and sends to governments statistical forms which are to be filled in by them.

All these statistics are received and classified by the Board and form the basis of its control. Article 24, paragraph 1, of the 1925 Convention states that the Board shall continuously watch the course of the international trade, and it goes on to give the Board special power of action if the information at its disposal leads the Board to conclude that excessive quantities of narcotic substances are accumulating in any country, or if there is a danger of such a country becoming a center of the illicit traffic. In such cases the Board has the following powers. In the first place it may ask for explanations through the Secretary-General of the League; secondly, if explanations are not given within a reasonable time, or if they are considered unsatisfactory, the Board may bring the matter to the attention of the parties to the convention and of the Council of the League, and may recommend that no further exports of any of the substances covered by the convention (raw materials and narcotic drugs) shall be made to the country concerned until the Board reports that the situation has been remedied (see Article 24, paragraph 2). The country against which the action is taken may bring the matter before the Council, as may also any party which is not prepared to act on the Board's recom-

mentation to cease exports. The convention further states (Article 24, paragraph 4) that any country which is not ready to accept the Board's recommendation shall so inform the Board and also explain to it its reasons if possible. The convention does not in any way indicate what action the Council may take. It was probably thought that the unfavorable publicity resulting from public discussions by the Council would be sufficient to make a country take the necessary measures to regulate its position to conform with the recommendations or findings of the Board. In addition to a public discussion, the Council would most likely adopt a resolution concerning the country involved and strongly urging other countries to act on the Board's recommendation to cease further exports to the country. In some cases explanations have been asked for through the Secretary-General (under Article 24, paragraph 1) and the government concerned has been invited to appear before the Board to explain or justify its actions. It has never been necessary to go further. The procedure of inviting a country to defend itself before the Board follows from Article 24, paragraph 7, which provides for such invitation when a question directly affecting the country is considered by the Board.

Under the 1925 Convention, the Board has thus two different methods to deal with an unsatisfactory position, namely, recommendation of an embargo on exports and reference to the Council of the League. In fact, the convention combines these two methods so that they work simultaneously. If the country which is in danger of becoming a center of illicit traffic should happen not to be a party to the convention, the Board may take the same action as if the country were a party to the convention. The same procedure applies, except that the Board is not expressly entitled to publish a report on the matter.

The 1925 Convention provides that the annual statistics received shall be communicated to all parties to the convention (Article 22, paragraph 1) and that the Board shall present an annual report on its work to the Council. The report shall be published and communicated to all contracting parties. The annual statistics are, in practice, annexed to the annual report of the Board.

The 1931 Convention provided, through its system of binding estimates, an effective measuring rod for the control exercised by the Central Board; and it was possible to give the Board more extensive powers on one particular point. The Board was entrusted with the task of making sure that governments do not exceed their estimates (Article 14).

This control is exercised both on the basis of quarterly import and export statistics and of the annual statistics. The action which the Board may take if excesses occur is different in the two cases. If the import and export returns should indicate an excess over the estimates of the importing country, the Board shall immediately notify all the parties to the convention; and during the year they may not authorize any new exports to the country con-

cerned unless supplementary estimates have been furnished which will eliminate the excess or unless the exporting country considers further exports essential in the interests of humanity or for the treatment of the sick. It should be noted that this action by the Board is not a recommendation, but the placing of an embargo against the country which has exceeded its estimates. The obligation to apply such an embargo naturally rests only on the parties to the convention, but it may be directed against a country which is not a party. This is another instance where countries which have not accepted the convention are very vitally affected by its provisions. The embargo procedure is, however, not as effective as would be desirable because the embargo remains in force only during the year in which the excess has occurred. This is a logical outcome of the fact that estimates are valid for each calendar year, and on the 1st of January they are replaced by new estimates. The Board receives the import and export statistics for the fourth quarter of the year only in January of the next year at the earliest, and the embargo procedure is thus inapplicable to excesses which may occur during the fourth quarter. This is obviously a weakness in the embargo procedure, particularly as excesses are most likely to happen towards the end of the year. The Board may, however, take other measures in regard to excesses which are noted during the fourth quarter, as will be shown below.

It was said above that the Board's power of action is different when excesses have been discovered through import and export statistics and through the annual statistics. The action on the basis of annual statistics is stated in Article 14, paragraph 3, which requires the Board to prepare and publish each year a statement containing for each country and territory a comparison of estimates, on one hand, and, on the other hand, statistics of consumption, manufacture, conversion, imports and exports. If the statement should prove that a party to the convention has failed to carry out its obligations, the Board has the right to ask for explanations through the Secretary-General of the League, and the procedure indicated in Article 24, paragraphs 2-7 of the Geneva Convention shall apply. This procedure has been described above. It is to be noted that, while the embargo procedure under Article 14, paragraph 2, may be initiated against a country non-party to the convention, the procedure under Article 14, paragraph 3, can only be applied to parties to the convention. If the Board should notice serious irregularities in the situation in a country not party to the convention, it may conclude that such a country is in danger of becoming a center of the illicit traffic and proceed against such a country under Article 26 of the Geneva Convention of 1925, which provides for the application of Article 24, paragraphs 3, 4 and 7, in such cases (see above).

When the Board takes action under Article 14, paragraph 3, of the 1931 Convention against a party, it may publish with its annual statement an account of the explanations given by the government concerned and any observations on the matter which the Board may desire to make.

The 1925 and the 1931 Conventions both remain in full force, and the Board can apply either Article 14, paragraphs 2 and 3, of the 1931 Convention, or Articles 24 and 26 of the 1925 Convention, according to circumstances. It may, therefore, be said that the Board's control as defined in the conventions and as described here extends over the whole world.

It was mentioned above that one of the Central Board's tasks is to watch continuously the course of the international trade. It performs this task not only in accordance with Article 24 of the 1925 Convention, but also through a careful check of the international trade on the basis of the quarterly import and export returns which the Board receives from governments. The purpose of this check is to make sure that the exported quantities of raw materials and drugs actually arrive at their destination and arrive intact. Import returns must indicate country of origin, and export returns the country of destination. All these statistics are tabulated by the Board, and imports by one country are compared with the exports of the country of origin. If this comparison shows that an exported quantity has not been received by the country of destination, or if the quantities indicated in the export and import returns do not correspond, the Board undertakes enquiries both in the exporting and importing countries. These enquiries into so-called discrepancies between export and import returns have proved very useful. Governments know that they have to account to the Central Board for their exports and imports, and to do so they must have satisfactory statistical records.

The Permanent Central Board consists of eight members appointed for five years by the Council of the League. The members may not hold any office which puts them in a position of direct dependence on their governments. The convention guarantees the Board full technical independence in carrying out its duties under the conventions.

CONCLUSION

The international drug administration which has been analyzed here presents some features which are interesting as constituting important developments of international law and administration. The basic principle is common efforts in close collaboration for the common protection of the peoples of the earth, and this principle is embodied and expressed in international law—treaties and conventions. The international law in this field can only achieve its purpose if the application is universal. The mechanism of the conventions was therefore constructed so as to insure universal application.

States have bound themselves by treaties to adhere to some fundamental principles concerning the narcotic drug industry as a whole, to do certain things, and not to do other things. They have, to a large extent, relinquished their sovereign right to decide their own conduct in the matter of narcotic drugs, and they have agreed to submit to a far reaching international

supervision of the management of their own internal affairs in the drug field. The international supervising organs were provided with special means of enforcement and coercion which are embodied in the conventions and thus form part of the international law. This law lays down rules which have to be obeyed in international relations and within the national State. The parties to the conventions have undertaken to regulate and control the whole drug industry in accordance with international law, and this law thus affects every individual or firm or industry which has any contact whatsoever with narcotic drugs. Expressed in other words, this means that national interests have been superseded by international interests. Why was this elaborate system of international law and administration built up for narcotic drugs? The answer is because narcotic drugs, while they are of the greatest benefit to humanity on account of their therapeutic properties, are also dangerous substances which are subject to abuse. To prevent abuse and to protect humanity it was necessary to build up an international defense system.

The League of Nations has generally been recognized to have played a very useful and effective rôle in the control of narcotic drugs. The results obtained have been eminently satisfactory and have been achieved by means of an organization of functions divided between an advisory committee consisting of representatives of governments and two control bodies set up under international conventions with specific tasks and independent of governments. This organization has been assisted in its work by permanent secretariats. The whole administration which has had the exclusive task of organizing and supervising the field of international and national drug control has, in the course of time, acquired specialized and detailed knowledge of the problem. Its authority is widely recognized, and it enjoys the confidence of governments and of other organizations interested in the drug question. The work and achievement of the international drug administration prove that it is possible to join the whole world in international collaboration, and that in spite of divergent views, opinions, and interests, it is possible to find a common platform and to reach agreement on detailed and sometimes intricate measures of control.

This successful international machinery may perhaps serve as a model to follow in other fields which require international coöperation in order to control dangers incident to unregulated independent State action.

JUS PACIS AC BELLI?

PROLEGOMENA TO A SOCIOLOGY OF INTERNATIONAL LAW

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The traditional system of international law is based on the distinction between the law of peace and the law of war. In the formative period of international law, thinkers were fully aware of the problems hidden behind this classification. Positivist writers took over these conceptions, framed against the background of a philosophical vista of society. Yet in their hands these terms lost their original significance. It is the purpose of this investigation to throw light on this process and to consider the relevance of this dichotomy into peace and war for the positivist and sociological approaches to international law.

THE NATURALIST BASIS OF THE DICHOTOMY

Conceptions such as peace and war are intimately linked up with ideas on the structure of the international society and the motive powers behind it. Naturalist writers indicate their attitude towards these problems in their abstractions from political reality, and, as in our own time, the *is* and *ought* are not always neatly separated from each other. Reality and utopia often are amalgamated in the picture of the state of nature drawn by these thinkers. Whether the "natural condition of mankind" is depicted in darker or brighter colors depends on the pessimistic or optimistic, or, if preferred, on the "realistic" or "idealistic" outlook of each individual philosopher. Correspondingly, the emphasis changes from war as the natural state of relations between States to peace as "a state most highly agreeable to human nature."¹

Hobbes and Pufendorf are typical representatives of the two schools of thought. In Hobbes' *Elements of Law* is a passage which gives the quintessence of his view:

Seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men in this natural liberty is the estate of war. For war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared; and the time which is not war, is peace.²

¹ Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688), Bk. VIII, Ch. VI, 2. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1934.)

² Pt. I, Ch. 14, II; similarly in his *Leviathan*, Ch. 13. See also Plato, *The Laws*, Bk. I, 2; Pierino Belli, *De re Militari et Bello Tractatus* (1563), Pt. I, Ch. I, I; Spinoza, *Tractatus Politicus* (1677), Ch. 2, § 14 and Ch. 3, § 13. This conception lies at the bottom of the distinction in Muslim law between the "Abode of Islam" and the "Abode of War." Cf. M. Khadduri, *The Law of War and Peace in Islam* (London, 1940), pp. 20 and 46.

The opposite thesis finds equally firm upholders and may be illustrated by a quotation from Pufendorf's *De Jure Naturae et Gentium Libri Octo*:

Now it is one of the first principles of natural law that no one unjustly do another hurt or damage, as well as that men should perform for each other the duties of humanity, and show especial zeal to fulfil the matters upon which they have entered into particular agreements. When men observe these duties in their relations one with another, it is called peace, which is a state most highly agreeable to human nature and fitted to preserve it, the creation and preservation of which constitutes one of the chief reasons for the law of nature being placed in the hearts of men.³

It does not seem accidental that the earlier naturalists were more impressed by the reality of the *bellum omnium contra omnes* than by the utopia of the *civitas maxima*. In the early period of absolutism, the Leviathans found themselves involved in a continuous struggle for survival both on the internal and external fronts. The absolutist States were not yet strong enough for the grand strategy which required the compact units of greater Powers, backed by a mercantilist system of economics and taxation as well as by standing armies of considerable size. They were yet too weak to rely on big and decisive strokes. The undefined medley of war in peace provided the congenial atmosphere for the young absolutist State in its fight for survival and preponderance.⁴ It, therefore, was only logical that Grotius entitled his main work *De Jure Belli ac Pacis Libri Tres*; for war appeared to him as the all-inclusive and over-riding phenomenon: "There is no controversy which may not give rise to war."⁵

Thus, war occupies the central position in the systems of the early naturalists. This statement, however, is open to the challenge that it unduly minimizes the intentions of these writers. As it is commonly held, their aim was to limit the horrors of war, and, as seems to follow from their doctrines on the *bellum justum*, to limit the resort to war. The requirement of a *causa justa* appears to suggest that the normal state of affairs between States is one of peace, departure from which is merely permissible in clearly defined cases. In so far as the intentions of any writer are concerned, it is hard to furnish convincing proof for any thesis. It might, however, be relevant to bear in mind that most international lawyers of that period did not have a merely academic interest in international law nor were they the equivalent of modern pacifists. They were "men of the world," and a good many of

³ *Loc. cit.*; see also *ibid.*, Bk. II, Ch. II, 7 or his *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1673), Bk. II, Ch. XVI, I (Carnegie Endowment translation, New York, 1927), and the dictum in *Miller v. The Resolution*, U. S. Court of Appeals (1781), 2 Dallas 1: "As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society."

⁴ Cf. F. Meinecke's masterly description of the political background of this period in *Die Idee der Staatsraison in der neueren Geschichte* (Munich, 1929), p. 514 *et seq.*

⁵ Bk. I, Ch. I, I. (English translation in Carnegie Endowment edition, Oxford, The Clarendon Press, 1925.)

them were actively engaged in diplomacy or held honorable and honored posts as legal advisers to the very princes whom they were supposed to subject to the rule of law. Furthermore, all of them alike were only too anxious to see their legal propositions accepted by State practice. It, therefore, would presuppose a childlike naivety or a saintly character on their part to assume that they either were completely unaware of the power reality surrounding them or of the concessions which had to be made to make their systems acceptable to the powers that be. Yet such considerations can and should not do more than to neutralize the current story-book version of the early history of international law. Quite apart from the laudable or deplorable intentions of their creators, doctrines must be judged on their own merits and by the functions which they fulfil in the reality of society. Once they have been propounded, they live a life of their own, and the uses to which they are put depend on social forces beyond the control of their authors.

THE IDEOLOGY OF THE BELLUM JUSTUM

The two main problems around which naturalist thinking on war centers are well brought out in Gentili's definition of war as *publicorum armorum justa contentio*.⁶

The conception of war as a *public* contest merely put into legal form the object of absolutist policy to achieve and to hold the monopoly of legitimate physical force. The memory of the Middle Ages when vassals waged their private wars against their overlords, and the central authority merely attempted to limit these feuds, was still fresh in the early days of the absolute State. It, therefore, could not be asserted too often that any form of civil war was essentially different from the wars waged between sovereign princes and was, in Bacon's words, "like the heat of a fever."⁷ The intellectual support thus rendered to the cause of absolutism could only recommend the doctrine of the *bellum publicum* to the rulers of absolutist States. In this light, the insistence of naturalist writers on the need for a declaration of war receives a new meaning. Sovereigns did not so much consider this prerequisite of a just war as a burdensome limitation of their freedom of action, but as a golden opportunity of transforming their *de facto* monopoly of physical force into a *de jure* monopoly. The duty of the prince to guard the community against the danger of illegal war was bound to strengthen his claim to undisputed and exclusive authority in matters of peace and war. Duty implies competence, and competence has a tendency towards exclusiveness. This aspect of the matter is strongly stressed by Victoria: "Such a State, then, or the prince thereof, has authority to declare war, and no one else."⁸

⁶ *De Jure Belli Libri Tres* (1589), Bk. I, Ch. II (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933.)

⁷ In his essay *Of the Greatnesse of Kingdomes and Estates* (1597), XXIX.

⁸ *De Indis et de Jure Belli Relectiones* (1541), *Relectio Secunda*, No. 7 (Carnegie Institution translation, Washington, 1917). See also Grotius, *De Jure Belli ac Pacis Libri Tres*, Bk. III, Ch. 3, II.

Once the absolute State was firmly established, other considerations induced sovereigns to forget only too soon this solemn obligation for a declaration of war and the requirement fell into general disuse.⁹ Thus, State practice could accept without reservation the plea of the naturalists for the outlawry of private war. They were, however, supposed to consult "the good and the wise"¹⁰ on the prerequisites of *bellum justum*. What advice had the fathers of international law to offer? It is proposed to limit this examination to Gentili, for, with insignificant exceptions, his catalogue of *causae justae* is typical of the naturalist approach to this problem.¹¹ It seems only fair to select this distinguished Oxford professor of Italian extraction as modern jurists claim for him that he was the first to place the subject of war on a non-theological basis¹² and that his grasp of the doctrine of the *bellum justum* was even firmer than that of Grotius.¹³

According to Gentili, the first group of just wars is provided by defensive wars. They include what he charitably terms wars waged for reasons of expedient defence: "A defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible."¹⁴ It seems as if this all-embracing formula were enough to satisfy the most extreme adherent of the reason of state. Yet, obligingly, Gentili does not stop at this point. He proceeds to elaborate the grounds which justify even offensive wars, and he classifies them under the headings of honor, necessity and expediency.¹⁵ In the case of an alliance, a prince is justified in coming to the assistance of his ally as long as he is convinced of the justice of his ally's cause. If treaty obligations should prove to be incompatible with each other and both cases happened to be equally just, "preference should be given to the one who has priority."¹⁶ Should his disciples still feel any qualms of conscience as to the "justice" of their contemplated war, Gentili provides further arguments which even the most scrupulous or least gifted adept of power politics could hardly fail to perceive. These considerations are derived from the conceptions of subjective and relative justice. A sovereign may be engaged in an unjust war, but he may be wrongly under the impression that his cause is just. This, Gentili considers enough to exonerate a prince, though the unfortunate consequence of such liberalism may be that "in nearly every kind of dispute neither of the two disputants is unjust."¹⁷ Finally, a State may have a

⁹ Cf. Sir Travers Twiss, *The Law of Nations* (Oxford, 1875), Vol. II, p. 65.

¹⁰ Victoria, quoting from Terence, *loc. cit.*, No. 21.

¹¹ Useful surveys of this doctrine are contained in R. Regout, *La Doctrine de la Guerre Juste* (Paris, 1935), and W. Ballis, *The Legal Position of War* (The Hague, 1937). See also J. von Elbe, "The Evolution of the Concept of the Just War in International Law," this JOURNAL, Vol. 33 (1939), p. 665 *et seq.*

¹² T. E. Holland, *Studies in International Law* (Oxford, 1898), p. 58.

¹³ C. Phillipson, introduction to Gentili's *De Jure Belli Libri Tres* (Carnegie Endowment translation, Oxford, The Clarendon Press, 1933), Vol. II, p. 33a.

¹⁴ Gentili, *ibid.*, Bk. I, Ch. XIV.

¹⁵ *Ibid.*, Chs. XV, XVII, and XVIII.

¹⁶ *Ibid.*, Bk. III, Ch. XVIII.

¹⁷ *Ibid.*, Bk. I, Ch. VI.

cause which, relatively, is less just than that of its opponent. But in this case it must be remembered that "one man does not cease to be in the right because his opponent has a juster cause."¹⁸ Thus, "invincible ignorance," as Victoria has called this state of mind,¹⁹ is the best keeper of a king's conscience, if he wishes to rule in accordance with the precepts so ably set out by Machiavelli but equally feels bound to engage exclusively in "just" wars of a "defensive" or "offensive" character.

In these circumstances, a naturalist may be forgiven for not always bearing in mind his own subtle distinctions and for bluntly stating that "by the consent of nations a rule has been introduced that all wars, conducted on both sides by authority of the sovereign power, are to be held just wars."²⁰

It accordingly seems that there is little substance in the time-honored assertion that the naturalists have subjected war to law, and that rather cynical disregard of these norms by State practice merely amounts to regrettable violations of clearly defined standards. It very much looks like special pleading to retort that sovereigns paid their respect at least in form to these rules when they attempted to justify their wars of interest in terms of the doctrine of the *bellum justum*. In effect, this did not mean that war was subordinated to natural law, but that natural law was made subservient to the reason of state. In an international society in which the rulers of States are only responsible to their own conscience, an elastic theory with as many loopholes as the doctrine of the *bellum justum* was bound to degenerate into a mere ideology serving the interests which it was supposed to control. Had the naturalists insisted on more rigid standards, their teachings would have been ignored or interpreted out of existence. As, in accordance with their "realistic" outlook, they were prepared to come to terms with the powers that be, their theories could be turned to useful purposes. As Machiavelli reflects, "the people will complain of a war made without reason."²¹ Consequently, rulers are well advised not to ignore their home front, and this is the more necessary the wider awake public opinion and conscience happen to be. It is equally necessary to break the spirit of the enemy and to mobilize opinion in neutral countries. What could better serve this purpose than a foolproof case regarding the justice of one's own cause? In the field of intellectual warfare, which is not a twentieth century invention, the authority of a Victoria, Gentili or Grotius is worth a good many cannons and battalions, and, as has been shown, it was futile to attempt to apply their doctrines in accordance with the requirements of power politics. The implications of these theories, however, were still more far-reaching. The naturalists conveniently lent their authority to the thesis that some rather disconcerting passages in the Gospel on war were not to be taken too literally, and that war, provided that it was just, was authorized

¹⁸ Gentili, *ibid.*, Bk. I, Ch. VI.

¹⁹ *Loc. cit.*, No. 32.

²⁰ Grotius, *loc. cit.*, Bk. II, Ch. 17, S. 19.

²¹ Thoughts of a Statesman, Ch. II.

both by divine and natural law.²² Thus, seemingly, the naturalists consider war as an exceptional remedy. They do so, however, in a manner which does not actually hamper the actual supremacy of force in the international society, and they provide Statesmen with an ideological cover, highly appreciated in ages characterized by glaring gaps between the religious and ethical standards of individual morality and the requirements of power politics.²³

The conclusions reached so far may be summarized as follows: The naturalists derive their conceptions of peace and war from their vistas of the structure of international society either by abstractions from reality or by wishful speculations on human nature. For the "realistic" school of naturalists, war is the over-riding phenomenon, and peace can be defined only negatively by reference to war. The object of the "idealistic" school of naturalists to limit war to an exceptional remedy is frustrated by their own casuistry. It deprives the doctrine of the *bellum justum* of objective criteria between just and unjust wars and invites subjectivism and abuse by State practice. Thus, their doctrine degenerates into a mere ideology of power politics. The insistence of naturalist writers on the element of *bellum publicum* in their definitions of war corresponds to the interests of rising absolutism, as does their postulation for a declaration of war. Therefore, during the period of early absolutism this part of their doctrine meets with the full approval of State practice.

PEACE AND WAR IN THE MODERN DOCTRINE AND PRACTICE OF INTERNATIONAL LAW

The modern approach to the problem of peace and war is a medley of doctrines and assumptions. They may be discussed under three headings: The doctrine of the normality of peace, the doctrine of the alternative character of peace and war, and the doctrine of war as a status and objective phenomenon.

The doctrine of the normality of peace and the functions of war. In the leading treatises on international law the order of things, as it appeared to the naturalists, is reversed. *Jus Belli ac Pacis* is boldly transformed into *Jus Pacis ac Belli*. It is mostly taken for granted that peace is the normal state in international relations. Only exceptionally a writer condescends to state in so many words this "self-evident" assumption. Phillimore, in his *Commentaries upon International Law*, does so with commendable clarity:²⁴ "We have hitherto considered States in their normal, that is, their pacific

²² E.g., Victoria, *loc. cit.*, introd. Compare with this approach Erasmus' *Querela Pacis* (1517).

²³ For a more detailed analysis, see the present writer's *Power Politics* (London, 1941), p. 153 *et seq.*

²⁴ Vol. III (London, 1885), p. I. See also C. Phillipson, *The Effect of War on Contracts* (London, 1909), p. 25; Anonymous, "The League of Nations and the Laws of War," B.Y.I.L., 1920-1921, p. 109 *et seq.*; A. P. Higgins, "The Law of Peace," *ibid.*, 1923-1924, p. 153 *et seq.*; Sir John Fischer Williams, *Chapters on Current International Law and the League of Nations* (London, 1929), p. 73 *et seq.*

relations to each other. . . . We have now to consider the abnormal state of things which ensues upon a disturbance of these normal relations, when these rights have been invaded and these obligations not fulfilled."

Actually, such an assertion implies views and judgments on the nature and functions of war which are far from being self-explanatory. As has been shown before, the naturalists found their solutions of these problems by means of abstractions from reality or deductions from human nature. Modern writers who enjoyed the deceptive security of a stable balance of power system as it existed between 1815 and 1914, might have held with some justice that they, too, had drawn the obvious conclusions from their era of peace. For a generation which has witnessed two World Wars in its lifetime, the assumption of peace as the normal state of international relations is much more problematical. In a system of power politics, war is not an unhappy incident or an incalculable catastrophe, but the culminating point in a rising scale of pressure, the last resort of power politics when diplomacy fails to achieve its objects by the threat of force or the application of less drastic forms of pressure.²⁵ Thus, this doctrine is founded on a complete misinterpretation of the functions of war in modern international society.

A good many writers have tried to avoid the real issue by remarkable feats of escapism. Over and over it has been repeated that war is an event,²⁶ a question of fact,²⁷ or "an international fact in the first degree."²⁸ If this meant that war is legally irrelevant, it would prove rather too much; for it would imply that international law is not capable of dealing with legal problems arising out of war. Rightly, this conclusion is not drawn by international lawyers. This classification of war may mean, too, that war entails legal consequences, but is not capable of legal control.²⁹ To prove this is the avowed or implied object of those who interpret war as akin to revolution or as an emergency agency of change. How could a legal system attempt to control revolution or effect far-reaching changes without elaborate legislative organs in which clearly international law is so utterly lacking? As, however, the need for revolution or sweeping changes is only apparent in exceptional circumstances, peace may still be considered to be the state of normality in the inter-State system. By the opposite procedure others arrive at the same result. They assert that war is not at all incompatible with international law, but comparable to legal institutions such as self-help, the right of action, something like the sanction or law of procedure by means of which the law of peace is realized.³⁰

²⁵ For a more detailed discussion of the functions of war in modern international society, see the writer's *Power Politics*, *supra*, p. 132 *et seq.*

²⁶ Cf. Q. Wright, "Changes in the Conception of War," this JOURNAL, Vol. 18 (1924), p. 756.

²⁷ See G. J. Webber, *Effect of War on Contract* (London, 1940), p. I.

²⁸ The Permanent Court of Arbitration in the case of the Russian Indemnities, XI, p. 82.

²⁹ Wright, *loc. cit.*

³⁰ For a more detailed examination of these and other theories on war, see the writer's *Power Politics*, *supra*, p. 129 *et seq.*

It should not be denied that, in certain circumstances, war is an agency of self-help and of the violent adaptation of international society to fundamentally changed conditions. Yet it would be highly unrealistic to maintain that these are the only or even the main functions of international law. The functions of war are as manifold as the objects of power politics.

Thus, it appears that neither the self-denying classification of war as a fact nor the *ad hoc* sociology of international lawyers can furnish proof for the thesis that peace is the normal state in international law and relations. In the idealistic variety of naturalist doctrine, the primacy of peace was logically assured by the concept of the *bellum justum*. If modern doctrine were consistent, it would have to derive its assertions regarding the normal or exceptional character of peace and war from the detached observation of the reality of international relations. The actual fluctuations between periods of peace and war do not seem to justify a doctrine of the normality of peace.³¹ This assumption, therefore, is nothing more than a lingering relic of naturalist philosophy on the nature of man.

The doctrine of the alternative character of peace and war and the reality of state practice. In the systems of naturalist writers, this doctrine is perfectly understandable. As they keep reprisals within very narrow limits, and jural war depends on a *causa justa*, "War and peace are correlatively opposite, and what is said affirmatively of the one is said negatively of the other."³² Thus, Grotius can quote Cicero with approval: "*Inter bellum et pacem nihil est medium.*"³³ It should not, however, be forgotten that even amongst naturalists this doctrine was not upheld with unanimity. In the words of Pufendorf,³⁴ "some states more expressly denote a relation toward other men than do others, since they signify distinctly the mode in which men mutually transact their business. The most outstanding of these are peace and war."

In view of the fact that modern doctrine does not and cannot insist on a just cause as a condition of legal war, and State practice has made extensive use of military reprisals, pacific blockades and similar devices, the proposition of the alternative character of peace and war as part of modern international law³⁵ requires to be proved to be believed. It may claim to be in accordance with the practice of English courts.³⁶ Their view may be sum-

³¹ Cf. Q. Wright, *The Causes of War and the Conditions of Peace* (London, 1935), p. 21 *et seq.*

³² Gentili, *loc. cit.*, Bk. III, Ch. XXIV.

³³ *Op. cit.*, Bk. III, Ch. XXI, I, I, and Cicero, *Philippica*, VII.

³⁴ *Op. cit.*, Bk. I, Ch. I, 8.

³⁵ Cf. A. D. McNair, "The Legal Meaning of War," Grotius Society, XI, p. 33, and J. L. Briery, "International Law and Resort to Armed Force," *Cambridge Law Journal*, 1932, p. 314.

³⁶ On the attitude of American courts which have a similar tendency to leave such "political" decisions in the hands of the Executive, see Q. Wright, *The Control of American Foreign Relations* (New York, 1922), p. 172 *et seq.*, and W. J. Ronan, "English and American Courts and the Definition of War," this JOURNAL, Vol. 31 (1937), p. 650.

marized in the words of Lord Macnaghten in *Janson v. Driefontein Consolidated Mines, Ltd.*:³⁷ "The law recognizes a state of peace and a state of war, but . . . it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace or war." This statement, however, must be read in its context which indicates the reason for the rigid adherence of English courts to the doctrine of the complementary character of peace and war. It follows from the general attitude taken by English courts regarding vital issues of foreign affairs affecting this country. These matters are within the prerogative of the Crown, and "it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. . . . If and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects."³⁸ This practice is not derived from the scrutiny of positive international law, but is based on a division of functions between the judiciary and the executive, considered desirable from the point of view of English law, and it gives expression to the legitimate concern of courts for the certainty of their municipal law. It is, therefore, impossible to derive from this practice any conclusions regarding the validity of the doctrine of the alternative character of peace and war as a doctrine of international law.

As in the case of the doctrine of the normality of peace, this doctrine could derive its only justification from State practice. The foreign relations of all great Powers contain frequent instances of resort to armed force short of war or, as they are sometimes called, of "pre-belligerent acts."³⁹ Military interventions and reprisals, material guarantees and pacific blockades have become such household terms of power diplomacy and modern treatises on international law⁴⁰ that it suffices merely to refer to them in order to indicate the problematic character of the alternative between peace and war. It cannot be doubted that these measures are "tinged with a hostile character"; it is admitted that they are "often but the train which awaits only a spark to be kindled into the full blaze of open war." Yet it is still asserted that they are "not in themselves inconsistent with the maintenance of peace."⁴¹ Arguments to the effect that such measures merely constitute an abuse of

³⁷ A. C. (1902) 484, at p. 497.

³⁸ *Ibid.*, pp. 497-8.

³⁹ F. E. Smith, *International Law* (London, 1903), p. 90.

⁴⁰ Cf. T. E. Holland, *op. cit.*, p. 130 *et seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908); J. Westlake, *Collected Papers* (Cambridge, 1914), p. 572 *et seq.*; E. C. Stowell, *Intervention in International Law* (Washington, 1921); C. C. Hyde, *International Law* (Boston, 1922), Vol. II, p. 192; P. H. Winfield, "The History of Intervention in International Law," *B.Y.I.L.*, 1922-1923, p. 130 *et seq.*; "The Grounds of Intervention in International Law," *ibid.*, 1924, p. 149 *et seq.*; S. Maccoby, "Reprisals as a Measure of Redress Short of War," *Cambridge Law Journal*, 1926, p. 60 *et seq.*; A. E. Hindmarsh, *Force in Peace*, Cambridge (Mass.), 1933; H. Rumpf, "Is a Definition of War Necessary?", *Boston University Law Review*, 1938, p. 705 *et seq.*

⁴¹ Sir Robert Phillimore, *op. cit.*, Vol. III, p. 16.

force and amount to war in disguise may be successful in some instances.⁴² They do not, however, offer a satisfactory explanation of all or even the greater majority of these cases. It is hard to see how the limited application of force can amount to war if not only third States but also the State against which these measures are taken insists on the continuation of peaceful relations with the State resorting to a limited use of armed force. The current explanation that, by customary international law, these measures have been incorporated into the law of peace, is correct if it means that resort to armed force short of war may be lawful in certain circumstances. Yet how can writers who take this line square with their contention the attitude of third States in those cases in which they insist on the application of the laws of neutrality to their own relations with the contending States, while the latter insist on the continuance of a state of peace between themselves?⁴³ This view leads to the paradoxical conception of neutrality in time of peace, not a very pleasant constellation for the followers of the doctrine of the alternative character of peace and war. This doctrine and the reality of measures short of war can be reconciled only at the price of depriving the state of peace of all positive criteria and of reducing it to a merely negative status.⁴⁴ To see peace and war in their proper perspective, it is necessary to analyze these states against the background of the reality of power politics which is the over-riding phenomenon in international affairs.⁴⁵

Powers are in a state of peace with each other when they are prepared to apply to their mutual relations the extensive system of legal rules which is

⁴² A. G. Heffter, *Le Droit International de l'Europe* (edited by F. H. Geffken), Paris, 1883, p. 246; Th. Baty, *The Canons of International Law* (London, 1930), p. 110; C. Parry, "Some Nineteenth Century Pacific Blockades," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1938, p. 672 *et seq.*

⁴³ See on the blockade by France of Formosa (1884), Hall-Higgins, *A Treatise on International Law* (London, 1924), pp. 439-440; on the British-German-Italian blockade of Venezuela, J. Basdevant, *L'Action Coercitive Anglo-Germano-Italienne contre le Venezuela*, R.G.D.I.P., 1904, p. 422 *et seq.*, and Westlake, *op. cit.*, p. 585.

⁴⁴ The inability of modern doctrine, based on the assumption of the alternative of peace and war, adequately to deal with the use of force in "peace," may be illustrated by a few examples: H. Wheaton, *History of the Law of Nations in Europe and America* (New York, 1845), p. 759: "It remains . . . an undefined and undefinable exception to the mutual independence of nations"; Hall-Higgins, *op. cit.*, p. 434: "Reprisals are acts of war in fact, though not in intention"; E. M. Borchard, "'War' and 'Peace,'" this JOURNAL, Vol. 27 (1933), pp. 115-116: "It must be conceded that *de facto* war, with or without a full state of war, is one of the commonest of phenomena, and . . . it cannot be reconciled with a state of peace"; Oppenheim's *International Law* (edited by H. Lauterpacht, London, 1940), Vol. II, p. 107: "Compulsive means are in theory and practice considered peaceable, although not amicable means of settling international differences"; H. Lauterpacht, "*Règles Générales du Droit de la Paix*," *Hague Recueil*, T. 62 (1937), p. 191: "*Le droit international conçu comme un ensemble de règles réglant la paix* (ou, ce qui revient au même, interdisant la violence)." See, however, G. W. Keeton, "Legal Guarantees of Peace," *Czechoslovak Y.B.I.L.*, London, 1942, p. 41.

⁴⁵ Cf. the writer's *Power Politics*, *supra*, Pt. I.

characterized, *e.g.*, by respect for territorial sovereignty, the freedom of the high seas and the exclusion of the use of armed force. In effect, this means that States are willing to exercise in their relations merely political and economic, but not military power.⁴⁶

Powers are in a state of war with each other and of neutrality towards third States, if, subject to customary and treaty limitations, they choose to apply against each other Power to the utmost, *i.e.*, military as well as political and economic power.

Modern States in their practice have merely drawn their own conclusions from the complete breakdown of the doctrine of the *bellum justum* when they consider themselves free not only to change over at will from a state of peace to a state of war, but also entitled to the liberal use of limited force.⁴⁷ It is characteristic of this state that it does not necessarily lead to the comprehensive use of power, as in case of war. Whether the state of peace continues with the State against which limited force is applied or not, depends on the latter's decision. Similarly, it is left to third States to decide for themselves whether, in their relations with the contending States, they prefer the laws of peace or neutrality. Even if all States directly and indirectly concerned acquiesced in the limited use of force, it appears to be a misnomer to call such a *pax bellicosa* by the name of peace. It is equally unwarranted to call war a state in which both contending States insist on the continuation of their peaceful relations, merely because third States wish to apply the law of neutrality during such a *bellum pacificum*. These constellations are incompatible with the states of peace and war; they constitute a state of their own, a *status mixtus*.

Equally scant respect was shown by State practice to the conception of the *bellum publicum*. Since the beginning of the 19th century,⁴⁸ States have in-

⁴⁶ See, on the different forms of power, B. Russell, *Power* (London, 1938).

⁴⁷ See on the unlimited right to war in modern international law, Hall-Higgins, *op. cit.*, p. 82, and on the attitude of British practice, the note of Mr. Christie to the Marquis of Abrantes (Dec. 30, 1862) and the dispatch of Earl Russell to Mr. Lettsom (Dec. 24, 1864), *Fontes Juris Gentium*, Series B, Sectio I, Tomus I, Part II (1856-71), Nos. 2398 and 2375. The measures applied by France and Great Britain against Holland in order to achieve the separation of Belgium in 1832-33 (Hogan, *op. cit.*, p. 80 *et seq.*) and similar measures of "international police" (Hall-Higgins, *op. cit.*, p. 441) show that State practice interprets liberally the conditions assumed by doctrine to limit the use of force in "peace." As Brierly observes, "all these writers seem conscious of a certain unreality in the profession of the law to regulate reprisals" (*loc. cit.*, p. 309). See also C. Eagleton, "The Form and Function of the Declaration of War," this JOURNAL, Vol. 32 (1938), p. 19 *et seq.*

⁴⁸ A. Rougier, *Les Guerres Civiles et le Droit des Gens* (Paris, 1903); resolution adopted by the *Institut de Droit International*, 1900, in Carnegie Endowment, *Resolutions of the Institute of International Law* (New York, 1916), pp. 157-159; H. A. Smith, *Great Britain and the Law of Nations* (London, 1932), Vol. I, p. 261 *et seq.*, particularly also the opinion quoted there of Dr. Lushington (May 29, 1823, p. 293): "To apply the strict principles of the Law of Nations to a state of things so anomalous, would, I apprehend, tend only to mislead the parties interested, for these questions are always mixed up with political considerations, and the practise will in some degree differ from the theory. Of this we have many instances in

sisted on their right at their discretion to recognize revolutionaries as belligerents, and, on less firm ground,⁴⁹ as insurgents if the insurrection amounted to a civil war. Thus, again, State practice found it necessary to build a half-way house, this time between the unreserved application of the principle of non-intervention in the domestic affairs of other States and the recognition of the insurgent government as the government of a sovereign State, a measure considered to be illegal during a civil war. If the government against which the revolutionary movement is directed itself recognizes the belligerency of the insurgents, third States are usually inclined to accept the position of neutrals in the contest.⁵⁰ If, however, that government is unwilling to do so, it is left to third States to decide for themselves whether they wish to ignore the civil war or elevate it into war proper by the recognition of the insurgents as belligerents. Thus, we are confronted with another typical instance of the *status mixtus*; at their discretion, States may consider one and the same phenomenon as a domestic affair, compatible with a state of peace, or as war.

The conclusion seems unavoidable that, as in the case of the doctrine of the normality of peace, the doctrine of the alternative character of peace and war cannot stand the test when confronted with State practice. It should be discarded as an uncritically accepted remnant of a now merely historically relevant naturalist approach to the problem of peace and war.

The doctrine of war as a status and objective phenomenon. Attempts at defining war in modern doctrine are dominated by Grotius' definition of war as a status or condition: "War is the condition of those contending by force, viewed simply as such."⁵¹ The emphasis on the status of war as the alternative to that of peace is congenial to medieval thinking and there finds its legal expression in the *diffidatio*, the message of defiance which severs the tie of faith between him who sends it and him who receives it.⁵² This concep-

regard to Spanish South America, the British Government having endeavoured to carry on its intercourse on equitable and beneficial principles, rather than adhere to the letter of the Law of Nations." See also Earl Russell's dispatch to Lord Lyons (Washington), Oct. 3. 1861, *Fontes Juris Gentium*, *loc. cit.*, No. 2431. As Smith himself holds, "the true doctrine is that the recognition of the insurgent government is the necessary and logical consequence of recognizing the fact of war." ("Some Problems of the Spanish Civil War," B.Y.I.L., 1937, p. 18.)

⁴⁹ See G. G. Wilson, "Insurgency and International Maritime Law," this JOURNAL, Vol. 1 (1907), p. 46 *et seq.*; Hall-Higgins, *op. cit.*, pp. 46-47; A. D. McNair, "The Law relating to the Civil War in Spain," L.Q.R., 1937, p. 484 *et seq.* (particularly on the quasi-blockades established by insurgents); H. Lauterpacht, "Recognition of Insurgents as a de facto Government," M.L.R., 1939, p. 4.

⁵⁰ Cf. Hall-Higgins, *op. cit.*, pp. 36-37.

⁵¹ *Op. cit.*, Bk. I, Ch. I, S. 2, I: "*Status per vim certantium qua tales sunt.*" See J. Westlake, *International Law*, Vol. II (Cambridge, 1913), p. I, and A. D. McNair, *loc. cit.*, p. 33.

⁵² Westlake, *ibid.*, p. 8. This form of declaration of war was used for the last time in 1657 when Sweden declared war against Denmark by a herald-at-arms sent to Copenhagen (Sir Travers Twiss, *op. cit.*, p. 62).

tion of war as a status equally fits into the naturalist scheme, as naturalist writers consider peace incompatible with the use of armed force between States. Apart from special treaty obligations, modern doctrine, however, cannot rely on the certainty of a declaration of war as an equivalent to the old *diffidatio*, and, in the face of contrary State practice,⁵³ cannot assert a customary rule requiring a declaration of war. Whether, in these circumstances, insistence on war as a status means anything depends on the capability of modern doctrine to find an objective criterion defining war as distinct from peace and the *status mixtus*.

If modern writers were consistent, they would have to remember in their definitions of war their own assumptions of peace as the normal state and of the alternative character of peace and war. Such consideration for their own doctrines would necessarily lead them to a definition of war by reference to peace. Yet this would be too much to expect. The best of which modern doctrine seems capable in relating war to peace, is contained, albeit only on the index, in a leading textbook: "Peace: see Termination of War."⁵⁴

Commonly, war is defined as a contention of States through their armed forces for the purpose of overpowering each other.⁵⁵ At first sight, the element of the definition, *contention of States through their armed forces*, appears to offer an objective criterion of distinction between the states of peace and war. Even if this could be granted, this definition could not be regarded as adequate, as it does not cover two types of war. States, geographically widely separated, may declare war against each other and apply the laws of warfare (confiscation of property belonging to the enemy State, internment of enemy aliens, etc.) in their mutual relations without being able to bring about a contention between their armed forces. Or, a State which is at war may deem it prudent to withdraw its armed forces in such a way that, again, there is no opportunity for the required contention between the armed forces to occur. Instances of the first class are provided by the relations between South and Central American States and the Central Powers in the First World War and by corresponding situations in the present world war. An example of the second type is offered by the Bulgarian withdrawal before the Rumanian troops in the Second Balkan War.

Yet a still more serious flaw of this definition consists in its inability objectively to indicate the borderline between war and the *status mixtus*. States may contend through their armed forces, but, as in the case of the extensive battles between Russian and Japanese troops on the frontier between the U.S.S.R. and Manchukuo, may be unwilling to consider such acts as a state of war. Thus, this definition either amounts to the assertion that States are at war with each other against their own will, or these cases have

⁵³ T. J. Lawrence, *War and Neutrality in the Far East* (London, 1904), p. 26 *et seq.*

⁵⁴ Hall-Higgins, *op. cit.*, p. 941.

⁵⁵ Cf. Westlake, *op. cit.*, p. 1; Oppenheim's *International Law*, *ibid.*, p. 168; and C. Eagleton, "The Attempt to Define War," *International Conciliation*, 1933, p. 259 *et seq.*

to be distinguished from war by the introduction into the definition of a subjective element, the *animus belligerendi*.⁵⁶ Modern doctrine usually chooses this latter alternative as the minor evil. This, however, means that not much is left of the so highly coveted assumption of the alternative character of peace and war and of the apparently objective criterion of the contention of States through their armed forces. The acceptance of the *animus belligerendi* reduces the current definition of war to the truism that States contending with each other through their armed forces are at war with each other if they want to be at war with each other. If one of the contending States unmistakably expresses its will, the status of war is created. If, however, the belligerents fail to do so, third States are free to interpret at their own discretion the legal significance of "a contention of States through their armed forces."

This failure of modern doctrine is not the fault of individual writers. It is due to the impossibility of achieving what modern theorists attempt to do. In a system of international law which admits the limited use of force to its law of peace, or in which there are more than two states of legal relationships as pointed out in this article, it is impossible to find an objective criterion which distinguishes the status of war both from the status of peace and from the *status mixtus*.

In these circumstances, all that can be said is this:

Declared war creates the status of war between the States directly concerned and with regard to third States.

Measures taken within the purview of the *status mixtus* and of undeclared war automatically create a state of war between the States directly concerned, and of neutrality with regard to third States, only if the State against which these measures are taken, or undeclared war is waged, chooses to consider such action as amounting to war. In the absence of an unequivocal declaration to this effect, third States are free to decide for themselves whether they wish to regulate their relations with the contending States in accordance with the law of peace or the law of war.

Thus it appears that, when faced with the concrete task of defining war, modern doctrine has to disregard its own assumptions of peace as the normal state and of the alternative character of peace and war. The current definition of war is incomplete and only seemingly objective. The express or implied inclusion in this definition of the *animus belligerendi* either amounts to the implicit admission of the *status mixtus* which is determined by intentions rather than acts, or to the unavoidable acceptance of a *continuum* be-

⁵⁶ Cf. Westlake, *ibid.*, pp. 1-2; McNair, *loc. cit.*, p. 45; Oppenheim, *ibid.*, p. 241. See also the pertinent comment of Sir Wilfrid Greene, M.R., in *Kawasaki Kisen Kabushiki of Kobe v. Bantham S. S. Co., Ltd.*: "What *animus belligerendi* meant was again a matter of obscurity, and to define war by relation to it came near to define war by itself" (A.C. 55, T.L.R. 503, at p. 505) and the observations of Sir John Fischer Williams, "The Covenant of the League of Nations and War," *Cambridge Law Journal*, 1933, p. 8 *et seq.*

tween peace and war which reduces peace to a merely negative status. If the laws of neutrality are applied in a state which the "belligerents" consider to be peace, or those of warfare in a state which third States regard as peace, this means that there is no intrinsic difference between the states of peace and war. The application of the laws of peace and war becomes a question of consensus amongst the States directly and indirectly concerned.⁵⁷ Doctrine based on State practice does not and cannot provide objective tests regarding the circumstances in which the different sets of rules are to be applied, and the practice of power diplomacy is not a promising field in which to look for the initiative in the precise separation of measures where the choice is mainly a question of expediency.

It appears, therefore, that none of the assertions of the modern doctrine on peace and war can be upheld.

The doctrine of the normality of peace is merely a survival of naturalist thought, but is incompatible with the real functions of war in modern international society.

The doctrine of the alternative character of peace and war, of the same naturalist origin, minimizes or ignores the reality of State practice which has created rules pertaining neither to those of peace or war, but constituting a *status mixtus*.

The doctrine of war as a status and objective phenomenon breaks down over the reality of the *status mixtus*. This status is not separated from those of peace and war by any objective tests. States contend by power in peace and war. In the state of peace, they are limited to the use of economic and political power. In the *status mixtus*, they supplement these forms of power by the use of military power. In the state of war, they use all available forms of power. It betrays an over-estimation of the difference between political and economic power as compared with military power, to imagine that, within a system of power politics, there is any qualitative difference between the states of peace and war.

The traditional division of international law into the law of peace and the law of war may be expedient for didactic purposes. The necessary subjectivity, however, of the available criteria of distinction between the two, or better three, states of typical legal relations between States deprives this classification of any claim to scientific sacrosanctity.

THE DISTINCTION BETWEEN PEACE AND WAR IN INTERNATIONAL CONVENTIONS

To round out the picture, it seems worth while to examine whether the conclusions reached so far are affected by relevant international conventions. If States had desired to create a clear borderline between peace and war,

⁵⁷ Thus, States may slip as informally from war into peace as from peace into war. Cf. Hyde, *op. cit.*, pp. 820-821; C. C. Transill, "Termination of War by Mere Cessation of Hostilities," L.Q.R., 1922, p. 26 *et seq.*; W. E. Beckett, "The Right to Trade and the Right to Sue," *ibid.*, 1923, p. 89 *et seq.*

they could have achieved this object only at the price of renouncing their claim to the use of force in time of "peace." Then war and the use of armed force would have become identical, and a clearly discernible criterion of war would have become available. This truly objective test was used in the Second Hague Convention of 1907 regarding the Limitation of the Employment of Force for the Recovery of Contract Debts. Nevertheless, the Powers represented at the Second Hague Peace Conference were not prepared to abolish the *status mixtus* as such. This became embarrassingly evident in the discussions of the second sub-committee of the Second Commission when the Chinese military delegate analyzed the proposed Convention on Compulsory Declaration of War in the light of the then recent Boxer expedition, and suggested a clear definition of war.⁵⁸ In the words of a contemporary writer, "no one replied to these embarrassing questions. Governments are not loath to have the definition of what constitutes war shrouded in mystery; for in the greater number of States possessing a parliamentary form of government the decision to make war is hedged about with formalities and special constitutional requirements, and governments have in the past and are likely in the future to find it convenient for reasons of domestic and foreign policy to resort to measures of war while maintaining that no war exists."⁵⁹ Thus, again, the term "hostilities" which is used in this convention really means acts of armed force carried out with the intent of war, and the door is kept wide open for undeclared war developing out of measures taken within the purview or under the cover of the *status mixtus*.⁶⁰

Equally instructive are the attempts made in the post-1919 period to distinguish between legal and illegal wars. In the Covenant of the League of Nations, terms such as war, threat of war, resort to war and acts of war are freely used. This question has received so much attention⁶¹ that it only seems necessary to emphasize the aspects particularly relevant to our discussion.

President Wilson's drafts make it obvious that he was fully aware of the dangers threatening his scheme if the *status mixtus* should be allowed to survive. Article VII of his various drafts runs, as follows:

If any Power shall declare war or begin hostilities, or take any hostile step short of war, against another Power before submitting the dispute involved to arbitrators as herein provided, or shall declare war or begin hostilities, or take any hostile step short of war, in regard to any dispute

⁵⁸ Carnegie Endowment, *The Proceedings of the Hague Peace Conferences* (New York, 1921), Vol. III, p. 169. In the view of the German Supreme Court, "although the Chinese expedition of 1900-1901 did not conduct a war in the sense of international law, and no declaration of war was made on China, it found itself nevertheless in a situation similar to that of war" (R.G.Z. 58, p. 328).

⁵⁹ E. C. Stowell, "Convention Relative to the Opening of Hostilities," this JOURNAL, Vol. 2 (1908), p. 55.

⁶⁰ See Westlake, *Collected Papers*, *supra*, pp. 591-592.

⁶¹ Cf. Eagleton, "Attempt to Define War," *loc. cit.*, pp. 250, 259 *et seq.*

which has been decided adversely to it by arbitrators chosen and empowered as herein provided, the contracting parties hereby bind themselves not only to cease all commerce and intercourse with that Power but also to unite in blockading and closing the frontiers of that Power to commerce or intercourse with any part of the world and to use any force that may be necessary to accomplish that object.

Yet, in the course of the drafting, Wilson's attempt seriously to curb power politics was quietly undone and his formulations were replaced in a matter-of-course way by the traditional terminology—"minor changes . . . of an entirely trivial character."⁶²

Further support to the view that war in the meaning of the Covenant was limited to war in the technical sense, was given by the equivocal treatment of the Corfu incident in League quarters and, particularly, by the sibylline report of the Committee of Jurists on this matter.⁶³

The evasive attitude taken by the members of the League towards the war between Bolivia and Paraguay,⁶⁴ and still more so towards the "war in disguise"⁶⁵ in Manchukuo, led to a situation in which illegal war under the Covenant was limited to cases in which the members of the League were prepared to say so.⁶⁶

Similarly, the use of the term "war" in the Kellogg Pact enables States to exercise their full discretion in deciding whether the use of armed force by a State or even contentions of States through their armed forces are to be considered as wars within the meaning of the pact.⁶⁷ Furthermore, the United States Secretary of State himself thought it necessary to affirm in the correspondence preceding the conclusion of the pact that each signatory alone would be "competent to decide whether circumstances require recourse to war in self-defense."⁶⁸ Thus, again, illegal war was limited to armed contentions between States which the signatories cared to consider as such.

State practice went still further in its obliteration of the few distinguishing marks that were left between peace, the *status mixtus* and war. If, in the case of a measure taken within the *status mixtus*, a State is free to consider

⁶² D. H. Miller, *The Drafting of the Covenant* (New York, 1928), Vol. I, pp. 59, 213, 214 and 222, and Vol. II, pp. 12, 81-84, 101, 138 and 149.

⁶³ See McNair, *loc. cit.*, pp. 226-227, and the writer's *Power Politics*, *supra*.

⁶⁴ Cf. R. M. Cooper, *American Consultation in World Affairs*, New York, 1934, p. 114 *et seq.*

⁶⁵ Lytton Report, p. 138.

⁶⁶ Cf. J. L. Briery, "Sanctions," *Grotius Society*, XVII, p. 79: "It seems clear that the action of Japan has not constituted a 'resort to war' in breach of her obligations under the Covenant"; Q. Wright, "When Does War Exist?", *this JOURNAL*, Vol. 26 (1932), p. 367; H. Lauterpacht, "'Resort to War' and the Interpretation of the Covenant during the Manchurian Dispute," *ibid.*, Vol. 28 (1934), pp. 48 and 52. See, however, Eagleton, *ibid.*, p. 250.

⁶⁷ Cf. Borchard, *loc. cit.*, p. 116, and Eagleton, *ibid.*, p. 284 *et seq.*

⁶⁸ Text of the note of June 23, 1928, in *this JOURNAL*, Supplement, Vol. 22 (1928), p. 109.

such a step as an act of war, it can in advance sign away its discretion to exchange the *status mixtus* for that of war. Thus, it is stipulated in the Treaty of Versailles⁶⁹ that measures which may include military reprisals⁷⁰ should not be regarded by Germany as acts of war. A similar clause is contained in the Hague Agreements of 1930.⁷¹ In the declarations exchanged January 20, 1930, Germany acknowledges that, in case of an intentional default, "it is legitimate that, in order to ensure the fulfilment of the obligations of the debtor Power resulting from the New Plan, the creditor Power or Powers should resume their full liberty of action."

Yet even this use of the freedom of contract was surpassed by the self-contradictions of the appeasement period. On the one hand, the Powers assembled at Nyon upheld the fiction that the Spanish War was not an international war and most of those States refused to grant recognition as belligerents to the insurgents. On the other hand, they did not base the Nyon Agreement on the obvious inadmissibility of sinking foreign merchantmen in time of peace. In order to enable the totalitarian aggressors to save their faces, they assimilated these acts of illegal intervention to piratical acts by submarines and aircraft of unknown Powers and arraigned the "pirates" for their violations of Part IV of the Treaty of London of 1930, *i.e.*, rules applicable in time of war between sovereign States.⁷²

It cannot, therefore, be maintained that the multilateral agreements concluded in pre-1914 days and during the era of "power politics in disguise" have contributed to the establishment of more solid criteria of distinction between peace and war. If anything, they have increased the tendency towards subjectivism and an unscrupulous abuse of terms. This was the unavoidable result of a "statesmanship" which, while insisting on unlimited sovereignty, felt bound to make paper concessions to popular demands incompatible with any system of power politics.

PROGRAMME FOR A SOCIOLOGY OF INTERNATIONAL LAW

It would by far overstep the limits of this article adequately to develop the tests by which a scientific analysis of international law would have to pro-

⁶⁹ Part VIII, Sec. I, Annex II, § 18, this JOURNAL, Supplement, Vol. 13 (1919), p. 264.

⁷⁰ Cf. A. D. McNair, B.Y.I.L., 1924, p. 182, and on "The Legality of the Occupation of the Ruhr," *ibid.*, p. 17 *et seq.*

⁷¹ Exchange of declarations between the Government of Germany and the Belgian, British, French, Italian and Japanese Governments of Jan. 20, 1930 (British and Foreign State Papers, 1930, Pt. I, p. 42); this JOURNAL, Supp., Vol. 24 (1930), p. 271.

⁷² Preamble of the Nyon Agreement regarding submarines, par. 2: "Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930, with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity which should justly be treated as acts of piracy." (B.Y.I.L., 1938, p. 205). See also the additional agreement concerning surface vessels and aircraft (*ibid.*, p. 206). The agreements also are printed in this JOURNAL, Supp., Vol. 31 (1937), pp. 179, 182.

ceed. In order, however, not entirely to limit these observations to criticism which, of necessity, must be destructive, it may be permitted at least to outline the constructive task.

The starting point must be the fundamental sociological distinction between society and community and a realization of the essentially different functions fulfilled by society and community laws.⁷³ It depends on the degree to which a society has integrated into a community, whether and to what extent: (1) law can develop its typical function of providing rational rules for the conduct of the members of the group, or this purpose is frustrated by the overriding power of "over-mighty subjects" within a group; (2) it can and must be authoritatively determined by persons appointed for this purpose and can be enforced against recalcitrant members.

A comparison between typical social laws, such as the laws imposed by conquerors or colonial Powers in the early stages of imperialism, with the rules governing relations such as marriage, blood brotherhood or religious communities, indicates the two extreme poles. Ultimately, the one is a law of power and the other a law of coördination. In the one, power, and, in the other, the common task,⁷⁴ is the decisive factor. Yet actual life seeks compromises between such extremes and "pure" types of law. Power must be limited even in the interest of those who wield it. Men obey better if they obey the rule of law and not the rule of men. They have an innate vision of justice. What kind of justice will be meted out to them depends on the character of the group in which they live and on the scope of the value consciousness of their own time. The constant trend, however, in any legal system which aims at an approximation to justice inevitably appears to be towards reciprocity. If a certain minimum of reciprocity is realized, the power behind the law has a tendency to become invisible. This situation seems to correspond to the typical make-up of human nature. Man is not predominantly altruistic, but is prepared to act on the basis of the principle *Do ut des*, to consider the application of this principle to his own affairs as fair and just, and to come to an understanding with his fellowmen on the standards by which the *quid pro quo* is to be determined. In exceptional circumstances, man is prepared to give more than he takes. This may be due to inferiority of power or to mistake and fraud. Then, reciprocity is achieved merely in a formal sense. In the first case, the lacking equivalent is made up by the awareness of the hypothetical situation in case agreement had not been achieved or the law of power had not been obeyed. In the second case, reciprocity is assumed but does not exist in reality. These two examples represent typical social constellations. The willingness to forego actual reciprocity may, however, also be due to a voluntary self-

⁷³ For a more detailed discussion, see the writer's *Power Politics*, *supra*, p. 33 *et seq.*, and "The Three Types of Law," *Ethics*, 1943, p. 89 *et seq.*

⁷⁴ This latter type of law has been well described by G. Niemeyer, *Law Without Force* (Princeton, 1941).

limitation and self-denial, when reciprocity in a spiritual sense is achieved by the consciousness of such sacrifice and its acknowledgment by the community. Thus, power, reciprocity and coördination seem to be the three constant elements of law, and the preponderance of one or the other appears to depend on the type of the group in which law fulfills its specific functions.

International law is a typical social law and a type of social law which does not condition, but is conditioned, by the rule of force.⁷⁵ Therefore, it is hard to conceive a more unrealistic assumption than the one which is the basis of the modern doctrine of international law: the normality of peace. The state of peace, as it exists between major wars, is nothing but the interval between the dynamic periods in which previous systems of power politics undergo a process of confirmation or transformation. The peace treaties of Westphalia, Vienna and Paris are the *Magnae Cartae* in which the hierarchy of power achieved during the wars preceding them has been continuously redefined. As peace is the result of force, it requires force to uphold the statics of any peace interval. This means that the same Power which has won the war must maintain the peace after the war. Therefore, within a system of power politics, there cannot exist any intrinsic difference between peace and war.

This explains why the law of peace contains so many rules directly related to the maintenance and justification of power politics in general and of specific systems of power politics established as the result of major wars. The functions of such rules are primarily those of an ideology. Norms such as title by conquest for the acquisition of territory, or the exclusion of duress as a ground for invalidating a peace treaty, are in a different category, as compared with those on the three-mile limit or on diplomatic immunity. They are still more different from those which govern the work of the International Commission for Air Navigation or the organization for the International Anti-Drug Campaign. The first category is representative of the law of power, congenial to an international society which is founded on the arbitrament of force. The second stands for the law of reciprocity which governs the relations of States in spheres irrelevant from the point of view of power politics and in circumstances when threat of force is no longer effective because States have already resorted to the ultimate means of pressure. The third gives a timid expression to that law of coördination which can only find its realization in an international community proper.

It is suggested that the analytical and descriptive work of past generations must be supplemented by a sociological analysis of international law as a law of power, reciprocity and coördination, and correspondingly as an ideology, reality and utopia.

⁷⁵ For a more detailed discussion, see the writer's *Power Politics*, *supra*, p. 138 *et seq.*

EDITORIAL COMMENT

JAPANESE EXECUTIONS OF AMERICAN AVIATORS

What the President referred to on April 21, 1943, as "the barbarous execution by the Japanese Government of some members of this country's armed forces who fell into Japanese hands as an incident of warfare"¹ truly shocked the sensibilities of the American people. The facts were these. The crews of two American planes fell into Japanese hands after a raid on Japan on April 18, 1942. They were tried before a military tribunal and sentenced to death. Following the commutation of that sentence for the larger number of them, the sentence of death was applied to the others.² The Japanese Government alleged that it subjected the American aviators to this treatment because they had intentionally bombed non-military installations, and had deliberately fired on civilians, and that the aviators had admitted the commission of those acts. The Government of the United States in response informed that of Japan that instructions to American armed forces had always ordered them to direct their attacks upon military objectives; that the American forces participating in the attack on Japan had had such instructions, and that it was known that they did not deviate therefrom.³ It branded, moreover, as false the charge that American aviators had intentionally attacked non-combatants anywhere. With regard to the allegation that the aviators had admitted the commission of the acts of which they were accused, the American Government declared that there were numerous known instances in which Japanese official agencies had employed brutal and bestial methods in extorting alleged confessions from persons in their power, and that it was customary for those agencies to use statements "obtained under torture, or alleged statements," in proceedings against the victims; and that if the admissions alleged by the Japanese Government to have been made by the American aviators had been in fact made, they could only have been "extorted fabrications."⁴

It was added, moreover, that the Japanese Government had entered into a "solemn obligation" by agreement with that of the Government of the United States to observe the terms of the Geneva Prisoners of War Convention,⁵ of which Article 1 made provision for the treatment as prisoners of

¹ Press Release, April 21, 1943.

² Dept. of State Press Release No. 148, April 21, 1943.

It was added: "The Government of the United States has subsequently been informed of the refusal of the Japanese Government to treat the remaining American aviators as prisoners of war, to divulge names, to state the sentences imposed upon them or to permit visits to them by the Swiss Minister as representative of the protecting Power for American interests."

³ *Id.*

⁴ *Id.*

⁵ *Id.*, where it was added: "The Government of the United States calls again upon the Japanese Government to carry out its agreement to observe the provisions of the convention

war of members of armies and of persons captured in the course of military operations, at sea or in the air; that Article 60 provided that, upon the opening of a judicial proceeding directed against a prisoner of war, the representative of the protecting Power should be given notice thereof at least three weeks prior to the trial, and of the names and charges against the prisoners of war who were to be tried; that Article 61 provided that no prisoner should be obliged to admit himself guilty of the act of which he was accused; that Article 62 provided that the accused should have the assistance of qualified counsel of his choice and that a representative of the protecting Power should be permitted to attend the trial; that Article 65 provided that sentence pronounced against a prisoner should be communicated to the protecting Power immediately; that Article 66 provided that in the event that the death penalty were pronounced, the details as to the nature and circumstances of the offense should be communicated to the protecting Power, for transmission to the Power in whose forces the prisoner served, and that the sentence should not be executed before the expiration of a period of at least three months after such communication. It was declared that the Japanese Government had not complied with any of these provisions of the convention in its treatment of the captured American aviators.⁶ The American communication did not advert to the fact, that under Article 2 of the convention "measures of reprisal" against prisoners of war were prohibited.

The complaint against Japan was seemingly two-fold: first that it had trumped up excuses, by extorted confessions, to exonerate itself from lawless conduct; and secondly, that it had been contemptuous of provisions of the Geneva Convention of 1929, which it had undertaken to respect. The strength of the American indictment, in point of both law and fact, was doubtless obvious to Japanese authority. It was perhaps amused that its pretenses of admissions on the part of the aviators were unmasked.

It is highly difficult for the United States judicially to probe the mind of Japan at such a time as the present, or to conclude correctly why the enemy executed the American aviators who were its prisoners.⁷ If such an achievement were possible it might of course assist in the solution of the main problem. That problem is to convince the enemy that somehow it itself will gain

by communicating to the Swiss Minister at Tokyo the charges and sentences imposed upon the American aviators, by permitting the Swiss representatives to visit those now held in prison, by restoring to those aviators the full rights to which they are entitled under the Prisoners of War Convention, and by informing the Minister of the names and disposition or place of burial of the bodies of any of the aviators against whom sentence of death has been carried out."

The text of the convention which was signed at Geneva, July 27, 1929, is contained in U. S. Treaties, Vol. IV, p. 5224; also this JOURNAL, Supp., Vol. 27 (1933), p. 59.

⁶ Dept. of State Press Release No. 148, April 21, 1943.

⁷ Still, the President did not hesitate to declare: "The effort of the Japanese war lords to intimidate us will utterly fail. It will make the American people more determined than ever to blot out the shameless militarism of Japan." (Press Release, April 21, 1943.)

more by heeding closely what custom and convention have decreed than by holding both in contempt. Mere preachments and scoldings, or warnings of punishments to be expected, are not in themselves likely to be real deterrents.⁸ A strong and implacable belligerent will never refrain from doing whatever its policy may decree unless convinced that the danger to itself from yielding to that policy is far too great. This fact shatters reason for the expectation that such a belligerent will be restrained by mere rules of warfare, howsoever expressed, from going its own way. It may be safely predicted that the belligerent will in each case gamble on what it can get away with, and will only be held in leash by fear lest it itself will be the chief sufferer if it sticks to its lawless course. If for example, Japan feared terrible retribution by its enemies when once in control of the Pacific, by laying waste wide areas, and by the leveling of cities such as Tokyo, there might be potent inducements to become law-respecting. Japanese authority may, however, still confidently expect and resolve to maintain supremacy over its own domain, by its air and land and sea forces, and have no fear of losing it. To break down that expectation and resolution by sheer military achievement is thus seemingly the one effective method to be relied upon. Mr. Churchill's recent statement that "in ashes" must "surely lie" the cities and other munitions centres of Japan "before peace comes back to the world," may cause uneasiness in Tokyo.⁹ But events at Attu Island are more impressive. Each fresh token of American victory transcends in influence any utterance from any source. If American aviators who may sadly fall into Japanese hands are to fare better than their predecessors, it will be due solely to an ever-increasing series of American successes from which Japanese authority can both see and understand the handwriting on the wall.

CHARLES CHENEY HYDE

EXECUTIVE AGREEMENTS RELATING TO PANAMA

On August 13, 1942, President Roosevelt sent a message to the Congress requesting authorization to execute "certain obligations under the treaties of 1903 and 1936 with Panama and other commitments." With this message the President transmitted a draft joint resolution effecting the proposed authorization. This draft resolution, with a few changes, was passed by the Congress in April and approved by the President May 3, 1943.

The resolution in brief provides for three things: The transfer by the

⁸ The American Government has informed that of Japan that it "will hold personally and officially responsible for those deliberate crimes all of those officers of the Japanese Government who participated in their commitment and will in due course bring those officers to justice." Such an accomplishment must, however, await the American victory. (Dept. of State Press Release No. 148, April 21, 1943.) See, in this connection, discussion of "Punishment of War Criminals," at meeting of the American Society of International Law, May 1, 1943, *Proceedings*, pp. 39-58.

⁹ Address before a joint session of the Congress, May 19, 1943, *New York Times*, May 20, 1943, p. 4.

United States to Panama of the water and sewer systems installed by the United States in the cities of Panama and Colon; the conveyance by the Panama Railroad Company to Panama of certain of its real estate holdings in said cities not needed in connection with the railroad or the canal; the payment to Panama of the principal and interest paid by her on account of the loan of the Export-Import Bank for the construction of Panama's share of the defense highway between Chorrea and Rio Hato where the United States has a military base and to liquidate the remaining obligations of Panama under that credit.¹

It appears that concurrent with the construction of the Panama Canal the United States, pursuant to the Treaty of 1903, installed water and sewerage systems in the cities of Panama and Colon and since then has been responsible for their operation and maintenance, the rates being collected by United States employees and designed to amortize the cost by 1957. By the same treaty these works, costing about \$2,700,000, were to "revert to and become the properties of the cities of Panama and Colon" in the year 1957. The unamortized cost is about \$860,000. The transfer of these works to Panama is conditioned on her paying a reasonable rate to the Canal Zone for water supplied by it, until Panama establishes another source of supply. This transfer is not to modify the existing responsibility of the United States for the public health services of the cities in question under the Treaty of 1903.²

The land to be transferred to Panama consists of certain lots in the cities of Colon and Panama owned by the Panama Railroad Company, whose capital stock is now wholly owned by the United States. The company, which to all intents and purposes is an agency of the United States, leases these properties mostly to Panamanian citizens, but also to Americans and other aliens for business and residential purposes, the United States thus becoming in effect one of the principal landlords in these cities. The income from rentals was about \$350,000 on property which came to the United States at little or no cost.

The Panama Railroad Company, then a private corporation, acquired the Island of Manzanillo, on which the city of Colon is located, by concessions from the then Republic of New Granada (now Colombia) in the years 1850, 1856 and 1867 (the last replacing the others) for a period of 99 years expiring in August, 1966. Panama, it is said, succeeded to the reversionary rights upon attaining her independence, and then turned them over to the United States by the Treaty of 1903, the railroad enjoying the usufruct meanwhile. The value of the Colon properties has been appraised at about \$10,000,000. The company also acquired certain property in the city of Panama between the years 1870 and 1922 at a cost of about \$68,000. This

¹ H. J. Resolution 14, Public Law 48, 78th Cong., Chap. 92, 1st Sess., Senate Reports 201 (2 parts), 1720 (2 parts); House Report 271; Hearings, Foreign Affairs Committee, March 16, 1943.

² *Idem*.

property has been valued at about \$1,500,000. It was proposed to clear up this real estate situation, which was repugnant to the sovereignty of Panama and did not involve the Panama Canal, by transferring these properties to that Republic.³

When the construction of the highway that connects the Rio Hato air base with the Canal Zone (over 70 miles long) was under consideration in 1940 a cooperative arrangement was entered into by an exchange of notes whereby Panama would undertake the responsibility for the construction with the advice of United States engineers, the United States contributing \$1,500,000 (appropriated by Congress) and Panama \$2,500,000 (through a credit established by the Export-Import Bank) of the construction cost. In December, 1941, owing to the urgency of completing the highway for defense purposes, the United States by agreement with Panama took over responsibility for the construction in accordance with new military requirements at a cost and under specifications in excess of those originally contemplated. It was, therefore, proposed to consider the construction as a United States enterprise and to assume the obligations of Panama in respect of the loan through the bank. In this connection the United States will receive about \$1,200,000 worth of roadbuilding machinery purchased by Panama.⁴

It was deemed desirable in the interest of improving relations with our Canal partner to correct these situations, particularly the first two which were irritating to Panama, although there was no obligation on the United States in the treaties of 1903 and 1936 to do any of the things authorized in the resolution.

✓On May 18, 1942, the United States and Panama entered into two agreements: One relates to the temporary use by the United States of some hundred defense sites in Panama for air fields, detector stations, searchlight positions, etc., in many parts of the Republic for the better protection of the Canal during the war. This agreement was not submitted to the Senate for approval, although it provides for approval by the National Assembly of Panama.⁵ The other agreement, embodied in an exchange of notes, relates, among other things, to the subject matter of the Joint Resolution, which agreement apparently has not been published or submitted to the Senate.⁶ While the two agreements are said to be distinct, yet the Panama Assembly apparently did not approve the former until the Joint Resolution was enacted. Panama had, however, relying on the conclusion of a satisfactory

³ *Idem.*

⁴ *Idem.*

⁵ State Department Bulletin, Vol. VI, No. 152, p. 448. For these sites the United States pays an annual rental of \$1 for all the public lands used, \$50 per hectare for private property, and \$10,000 for the Rio Hato area. *Id.* pp. 451-452. This agreement may be said to result from consultations provided for in Arts. II and X of the Treaty of 1936 with Panama.

⁶ The three subjects of the agreement are mentioned in State Department Bulletin, Vol. VI, No. 152, which adds: "The agreements reached on these three points will be submitted to the Congress of the United States for approval." *Id.* p. 448.

agreement, made the sites available 14 months before the agreement was signed, and United States forces began occupying and developing them.⁷

The debates on the Joint Resolution ranged over much ground but centered chiefly around the revisionary rights of Colombia in the city properties, the position of the lessees of that property, the expediency of making the grants to Panama, and the form and manner in which this should be done.⁸

The reversionary rights of Colombia were regarded in the view of the majority and of the State Department as having been cancelled by the formal recognition of the independence of Panama by Colombia and by the effect of the treaty settlement between the United States and Colombia signed April 6, 1914 (ratified 1922).⁹ Nevertheless, Senators questioned the soundness of this conclusion (which was one of interpretation) and believed that even though the sovereignty of Panama over her territory had been recognized by Colombia, there was no commitment as to real estate titles which stood exactly as they were before Panama became independent. In other words, the reversionary interest of Colombia to certain city properties after the expiration of the concessions in 1966 were vested rights to land which have not been disturbed by after events and will rise again to plague us. It was suggested that this question was opened in the debates on the Colombian treaty and not answered satisfactorily to the minds of "numerous" Senators.¹⁰ In this view it would appear that the United States could only convey the balance of the lease term to 1966 and quitclaim her supposed right to the reversion.

Nevertheless, it may be pointed out that, assuming the reversion after the expiry of the concessions related to the public domain of Colombia, such reversion would, according to the prevailing principles of international law, pass to Panama when she successfully revolted from Colombia and maintained her independence, which was eventually recognized by the parent State in the formal manner above mentioned.¹¹

In connection with leases of the city properties, the question was raised whether the lessees, who were of various nationalities and whose landlords

⁷ Congressional Record, April 13, 1943, pp. 3383-3384, April 26, p. 3800; Message of President Roosevelt, *supra*.

⁸ The debates will be found in the Congressional Record, daily edition, Nov. 30, 1942, p. 9511, Dec. 3, 1942, p. 9586, Dec. 4, 1942, p. 9641, April 13, 1943, p. 3392, April 26, 1943, p. 3798, May 3, 1943, p. 3933.

⁹ The rights of the United States with reference to the Panama Railroad Company, its rights, privileges, properties and concessions, were covered in Arts. VIII and XXII of the Treaty of 1903. Colombia recognized the independence of Panama and the American ownership of the Panama Railroad Company in the Treaty of 1914 with the United States. Nothing was said in the latter regarding reversionary rights. Colombia also recognized the independence of Panama in a protocol signed at Washington May 8, 1924. (Treaties and Conventions of Colombia, 1919-1938.)

¹⁰ Citing Congressional Record, April 20, 1921, p. 481.

¹¹ A. B. Keith, *The Theory of State Succession*, pp. 49, 57, 67.

were being changed over their heads, might not come back on the United States with claims, should Panama refuse to recognize the leaseholds or otherwise disturb their quiet enjoyment. An amendment to cover this point was rejected in the Foreign Relations Committee, but, after debate in the Senate, prevailed as the proviso to Section 2 providing (it would seem awkwardly) that the instruments of conveyance of the properties to Panama shall contain a provision "that the Panama Railroad Company or any of its successors in interest" (which includes Panama) agrees to protect the Government of the United States against such possible claims of lessees. This perhaps gives some protection to the United States, but little to the leaseholders whose rights may be in jeopardy. It would seem, as was suggested, that this matter could have been better covered in a treaty whereby Panama assumed the obligations of the grantor toward the lessees. A further agreement may be necessary to this end.¹²

The question of the expediency of making a gift to Panama at this time of properties, rights and monies, estimated to total \$15,000,000 to \$25,000,000, was fully argued in the debates. For the Administration it was said that the transaction was entirely independent of the agreement for the military sites, each matter standing on its own feet, and that the proposed action was in line with the policy of advancing inter-American coöperation by removing irksome conditions.¹³ However, it appears from the debates and reports

¹² Certain American claimants against Panama appeared before the Foreign Relations Committee suggesting that their claims for illegal deprivation of several hundred thousand acres of land by the courts and officials of Panama be adjusted in connection with the proposed grants to Panama. Senator White championed their cause: "My principal objection to the passage of this joint resolution is that it will convey to the Republic of Panama property of the value of many millions of dollars without adequate consideration, while American citizens are futilely asserting claims against Panama for property expropriated by Panama. . . .

"By the means which I have here sketched, Panama acquired the holdings of American citizens in that Republic. Those citizens were kept in complete ignorance of the proceedings involving their title until their legal rights and remedies had been lost; and now, notwithstanding this record of fraud, Panama refuses consideration of the claims of our citizens. It will not arbitrate; it will not negotiate; but it displays a complete willingness to accept from our Government property and advantages having a value of many millions of dollars." Some of these lands, it was said, are now being used for the very sites which the United States is leasing from Panama. (Senate Report 201, Part 2, 78th Cong., 1st Sess., pp. 10-12; Congressional Record, Dec. 3, 1942, p. 9595.) It is known that some of the claims against Panama have been pressed upon the attention of Panama by the Department of State since 1936 without results. They have been brushed aside in favor of so-called "national interests," while overlooking the national interest that is inseparably bound up with the security and fair dealing accorded to American investments abroad.

¹³ On this point Senator Connally remarked: "However, for many years Panama has been resting under a feeling of inferiority, and the feeling that her sovereignty was being invaded by the existence of private properties in Panama owned by the Government of the United States. Realizing that that has been a cause of comment for many years, our Government, like that of Panama, is acting in a generous spirit in undertaking to remove that objection by conveying the properties to the Republic of Panama. So I do not think it can be claimed

that Panama had long voiced her aspirations as to these matters and had called attention to them in these negotiations, that the two transactions were discussed apparently together in reaching the agreements of May 18, and that the good will evinced by Panama in respect to the sites agreement is made the occasion for the appreciative gesture in the Joint Resolution. Finally, since the Panama Assembly withheld approval of the sites agreement until the Joint Resolution was passed by Congress, it was fair to assume some understanding or some relationship between the two lines of action.

This discussion led to a consideration of the form and manner in which the action proposed in the Joint Resolution should have been taken. It was charged in the debates that the Administration was tending to control foreign policy by executive agreements and was thus by-passing the Senate's treaty-making power under the Constitution. It was suggested that here was an attempt by a Joint Resolution to carry out an undisclosed agreement or understanding which substantially modified the treaty rights of the United States. It was pointed out that under Article VII of the Treaty of 1903 Panama granted the United States the right to construct and maintain sewerage and water works in the cities of Panama and Colon, and

the Government of the United States, its agents or nominees shall be authorized to impose and collect water rates and sewerage rates which shall be sufficient to provide for the payment of interest and the amortization of the principal of the cost of said works within a period of fifty years and upon the expiration of said term of fifty years the system of sewers and water works shall revert to and become the properties of the cities of Panama and Colon respectively, and the use of the water shall be free to the inhabitants of Panama and Colon, except to the extent that water rates may be necessary for the operation and maintenance of said system of sewers and water.

It was also pointed out in regard to the property owned by the Panama Railroad Company in the cities of Panama and Colon that the Treaty of 1903 provides in Article VIII:

Panama grants to the United States all rights which it now has or hereafter may acquire to the property . . . of the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia to the Republic of Panama over the Isthmus of Panama.

. . . ¹⁴

This clause is construed as transferring to the United States the reversionary

that this is in effect a treaty. It is simply a generous action upon our part, not because there is any agreement in writing. There is no agreement that Panama should give us the sites, and no agreement on our part that if she gave us the sites we would give her something. So I do not think that in any sense it can be contended that it is a treaty." (Congressional Record, April 26, 1943, p. 3809.)

¹⁴ There appears to be nothing in the Treaty of 1936 in regard to the city properties or the water and sewerage systems, although by an exchange of notes dated March 2, 1936, attached to the treaty, it was agreed to discuss the latter subject further at a later date.

rights of Panama in respect of the concessions granted by Colombia to the Panama Railroad Company. These rights so acquired by the United States are now by the Joint Resolution to be reconveyed to Panama, for the Joint Resolution provides in Section 2 that "Any conveyance of any land in pursuance of the authority contained herein shall be deemed to release any and all reversionary rights of the United States in said property." It would seem, therefore, that the contention of certain Senators that the treaty rights of the United States will be changed or modified by virtue of the Joint Resolution is convincing.

Consequently, it was suggested in the debates that, if prior grants are to be modified, they should be modified by a document of equal rank and dignity with the granting instrument, in other words by a treaty instead of by an executive agreement and a joint resolution. It was recalled that the agreement of May 18 was subject to approval by the Panama Assembly but not by Congress. This led to a lengthy discussion over the distinction between executive agreements and treaties. In defense of the action under the Joint Resolution, Senator Connally, Chairman of the Foreign Relations Committee, stated:

The Senator from Connecticut insists that this measure would mean a change in the treaty. We are not being asked at all to change the treaty. By the Treaty of 1936, it was recognized we had certain rights in Panama, and the reason for this joint resolution is that under the Constitution [Article IV, Sec. 3] the Congress of the United States is the only agency which can divest the Government of property rights. So, therefore, we are asked to pass this joint resolution conveying those properties to Panama because that is the only constitutional way in which it can be done. Whenever we secured those titles they became ours to do with as we please, even though they may have been acquired under a treaty. After we get them they are ours, and it does not require any further treaty action as to how they shall be disposed of.¹⁵

It was pointed out also that the appropriation of funds required in this case is a legislative function independent of the treaty-making power.¹⁶

The debate did not result in any definite line being drawn between the nature and functions of treaties and of executive agreements. In fact, it was indicated that such a line could not be drawn with the precision of a civil engineer. Senator Connally suggested that "If it [the agreement] puts an obligation on the United States to do something, if it is within the proper sphere, it cannot be accomplished except by a treaty." On the other hand, as Commander-in-Chief and as the initiator of negotiations, he supposed the President could say to a co-belligerent, "I will not entertain a treaty of peace until you do." He did not agree that anything could be done by executive agreement that could be done by treaty. He had opposed the ending

¹⁵ Congressional Record, April 26, 1943, p. 3810; see also Dec. 3, 1942, pp. 9588, 9590.

¹⁶ Senate Report 201, April 22, 1943, p. 6.

of the World War by joint resolution rather than by treaty.¹⁷ It seems there have been horrible examples on both sides of the question, but these were exceptions and did not blot out the proper distinction.

The opposition declined to vote for the resolution because they believed it should come to the Senate in the form of a treaty and they did not wish to encourage the practice of executive agreements which detoured the treaty-making procedure and which might be misunderstood by foreign nations to be binding upon the United States. They also contended that executive agreements which were not authorized or ratified by Congress have no binding effect as law upon the government and no modifying effect on existing law. In fact, certain Senators thought executive agreements bind only the President during the term of his office.¹⁸

The Joint Resolution was passed in the Senate by a vote of thirty-seven to nineteen (forty not voting), which apparently means that, in the view of the Senate, its action on the proposed Joint Resolution was not an exercise of the treaty-making power under the constitution or inconsistent therewith.

In this connection it may be interesting to refer to the debates of the Constitutional Convention of 1787 on the treaty-making procedure requiring a two-thirds vote. In the session of August 23, when a draft to give the Senate power to make treaties was under consideration, an amendment that they should be "ratified by a law" was lost by a vote of 1 to 8. The objections were that "it was unfavorable to the little States which otherwise would have an equal share in making treaties" and that the legislature would be generally influenced by 2 or 3 men who might be corrupted. In the session of September 7 a motion to add the approval of the House of Representatives was lost 10 to 1. At the same session the requirement of a two-thirds vote of the Senators present was inserted (over the objection that it gave the minority power to control the will of the majority) for various reasons advanced in the convention, namely, that it would avoid approval by "a majority of the States without a majority of the people"; and that there was "danger of putting the essential rights of the Union in the hands of so small a number as the majority of the Senate representing perhaps only one-fifth of the people"; that "it had been too easy in the present Congress [of the Confederation] to make treaties although nine States were required for the purpose." The desire to be on the safe side in respect to treaties was emphasized when Mr. Gerry suggested that "the Senate will be corrupted by foreign influence."¹⁹

L. H. WOOLSEY

¹⁷ Congressional Record, Dec. 3, 1942, pp. 9591-9592.

¹⁸ *Ibid.*, p. 9597.

¹⁹ A motion to strike out the phrase "except treaties of peace" was carried by a vote of eight to three; a motion to strike out the requirement of two-thirds was lost by a vote of one to nine; a motion to require two-thirds of all the members of the Senate was lost three to eight; and a motion requiring a majority of the whole number of the Senate was lost five

STATUS OF CHAPLAINS WITH ARMED FORCES

The classification of persons during a war into combatants and noncombatants is not entirely adequate for all purposes,¹ since even members of armies may be noncombatants. Article 3 of the Annexes to Hague Convention IV of 1907 recognizes that the "armed forces of the belligerent parties may consist of combatants and noncombatants."² It is useful to distinguish persons who actually carry on hostilities from those who, while military persons, have functions distinguishable from those of ordinary fighting men.³ For the purpose of applying international rules, as well as national laws and regulations, it is desirable to have as much clarity as possible with respect to the position of all persons accompanying armed forces. Among such persons are chaplains. Their status under the laws of their respective countries, and the treatment which international law prescribes for them, present practical questions of the present war.

That the number of persons involved is considerable, will appear from facts relating to the office in Great Britain. There are at the present time about 2,250 chaplains serving with the British forces. Of these, up to April, 1943, 15 had been killed or had died of wounds, 113 had become prisoners of war, 17 were missing, and 14 had suffered death from accidents or had died while on active service.⁴ All are volunteers, there being four classes, with the relative rank of captain, major, lieutenant-colonel, and colonel respectively. The Chaplain General holds the relative rank of Major General. The senior chaplain of each formation appoints chaplains to their respective battle stations. Among the regulations relating to the work of chaplains are those providing that no officer or soldier will be obliged to attend the service of any religious denomination other than his own, and that every chaplain "has the right of direct communication on ecclesiastical matters with the recognized head of his denomination."⁵

to six. The last was regarded as giving less security than a two-thirds vote (Debates in the Federal Convention of 1787, Reported by James Madison, Ed. by Hunt and Scott, pp. 458 ff., 528 ff.). Compare Wallace McClure, *International Executive Agreements*, and the reviews of the same by D. M. Levitan, *Harvard Law Review*, May, 1942; E. M. Borchard, *Columbia Law Review*, May, 1942; F. K. Nielsen, *this JOURNAL*, Vol. 35 (1941), p. 576. See also J. B. Moore, *Treaties and Executive Agreements*, 20 *Pol. Sci. Quart.* 385.

¹ On the present day applicability of the traditional distinction, see R. R. Wilson, "Treatment of Civilian Alien Enemies," *this JOURNAL*, Vol. 37 (1943), at p. 31.

² 36 Stat., Pt. 2, p. 2277.

³ The recent creation of the Civil Affairs Division in the Office of the Chief of Staff of the United States Army suggests that there will be a considerable commissioned personnel who will have military duties other than those of ordinary combatants. *New York Times*, Apr. 8, 1943, p. 12.

⁴ For information in this paragraph the writer acknowledges the courtesy of the British Library of Information, New York City.

⁵ The King's Regulations for the Army and the Royal Army Reserve, 1940, paragraphs 1605, 1612.

That the question of a chaplain's status is not a new one will appear from a brief historical statement concerning the chaplaincy in the American Army. It dates back to General Washington's call, during the Revolutionary War, for clergymen with whom the Government might make contracts for six or twelve months' service, on the same basis as with surgeons of that day.⁶ Neither chaplains nor surgeons received commissions; although chaplains assigned to brigade headquarters had the assimilated rank of major, they had no actual status other than that of spiritual advisers. The Act of March 3, 1791, authorized the appointment of one chaplain for the Army in the event the President might think this necessary.⁷ In 1837 Congress provided for twenty post chaplains, and in 1849 it increased the number to thirty. During the war with Mexico there was authorization for one chaplain for each regiment of volunteers. This plan was continued during the War between the States.⁸ The Act of May 20, 1862, permitted President Lincoln to designate a chaplain for each general hospital.⁹

In the first World War, the plan was to have one chaplain for each 1,200 officers and enlisted men in the United States forces.¹⁰ Of the 2,364 American chaplains, 5 were killed in action, 6 died of wounds, 12 died of accidents or of disease, and 27 were wounded in action. Five received the Distinguished Service Medal, 23 the Distinguished Service Cross, and 57 received decorations from governments allied or associated with the United States.¹¹

At the present time legislation still authorizes the provision of one chaplain for every 1,200 officers and enlisted men in the American forces. Appointment is from "persons duly accredited by some religious denomination or organization, and of good standing therein. . . ." ¹² The number of Catholic, Jewish, and Protestant chaplains corresponds to the relative number of men of these faiths in the forces, and both white and Negro officers are now in the service. Appointees receive commissions as first lieutenants, and may advance to the rank of colonel. The Chief of Chaplains is entitled by law to hold the temporary rank of brigadier general.¹³ A Chaplain School is authorized at such place as the Secretary of War may prescribe, and the subjects there taught include, in addition to the conduct of public worship,

⁶ Press release from the Office of the Chief of Chaplains, Dec. 15, 1942.

⁷ 1 Stat., 222, 223. The appointee was to be entitled to fifty dollars per month, "including pay, rations and forage."

⁸ Act of July 22, 1861, 12 Stat., 270. Each chaplain (appointed by the regimental commander on the vote of the field officers and company commanders on duty with the regiment) was to receive the pay and allowances of a captain of cavalry.

⁹ 12 Stat., 404.

¹⁰ Acts of Oct. 6, 1917, and May 25, 1918, 40 Stat., Pt. 1, pp. 394, 561.

¹¹ Press release mentioned in note 6, *supra*.

¹² Army Regulations, 605-30b. The present comment has been restricted to Army regulations and, because of lack of space, has not included such matters as the recently announced plan of the Navy for training chaplains in designated educational institutions.

¹³ Act of Nov. 21, 1941, 55 Stat., 779; Army Regulations, 605-40, para. 5.

etc., "military law and regulations, rules of land warfare, functions and staff relations of chaplains in administrative positions. . . ." ¹⁴

As the spiritual leader of a command, the chaplain is the commanding officer's assistant in the task of seeing that every service man is given all possible assistance in practicing his religion.¹⁵ There is a distinctive chaplain's flag, which is to be used "as authorized by commanding officers to designate the time and place of divine service, and in the field to indicate the chaplain's quarters or office."¹⁶

Other belligerents have in their armies those who function in a somewhat comparable capacity, whether they are officially classified as a group with distinctive functions or not. According to an unofficial statement, there are many priests in the Russian Army who act as "unofficial chaplains."¹⁷ It is understood that a "field chaplain" (*Feldgeistlicher*) of the German Army is considered by the United States Government as a person who does not engage in hostilities, and who has a status similar to that of comparable officers in the British and American Armies. Presumably, the same status would be recognized for a member of the Japanese forces who might be taken prisoner and as to whom it could be shown that his functions were those of a noncombatant.¹⁸ There might, of course, be many persons with armies who might be priests or clergymen without their being designated by their own law and regulations as a class apart with functions not involving engagement in hostilities.

In the eighteenth century, chaplains, like surgeons, seem to have been liable to capture, but to have been commonly returned (when prisoners were being exchanged) without equivalents or ransom.¹⁹ In the following century usage pointed the way for treaty rules. During the American War between the States, for example, both the Union and Confederate authorities issued orders, in July, 1862, to the effect that chaplains taken as prisoners of war while in the discharge of their duties would be immediately and unconditionally released.²⁰ By Article 53 of the *Instructions for the Government of Armies of the United States in the Field* (1863), "The enemy's chaplains . . . if they fall into the hands of the American Army, are not prisoners of war, *unless the commander has reason to detain them.*"²¹

¹⁴ Army Regulations, 350-1500. See note 12, *supra*.

¹⁵ In a recent statement the Chief of Chaplains emphasized that the Army "in its policy concerning religion, exemplifies the spirit of freedom of conscience which is one of the ideals for which our troops are fighting." (Press release, War Dept., Bureau of Public Relations, March 20, 1943.)

¹⁶ Army Regulations, 260-10, para. 7.

¹⁷ World Alliance News Letter, Vol. XIX, No. 5 (May, 1943), p. 7.

¹⁸ An inquiry did not reveal that any such Japanese persons have as yet been captured by American forces.

¹⁹ W. E. Hall, *Int. Law* (7th ed., 1917), p. 427.

²⁰ Gen. Orders No. 46 of the Confederate Army, and No. 90 of the Union Army, Official Records of the Union and Confederate Armies, Ser. II, Vol. IV, pp. 269, 288.

²¹ Italics inserted.

The method of arranging through multilateral treaties for the special treatment of chaplains apparently began with the Red Cross Convention of August 22, 1864, which by its second article provided that certain classes of persons including chaplains might "participate in the benefit of neutrality" while discharging their functions. Even after an enemy had occupied the area they might continue to fulfill their duties, or might "withdraw in order to rejoin the corps to which they belong."²² The Geneva Convention of July 6, 1906, provided in Article 9 that ". . . chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war." By Article 12, they were to continue, after having fallen into the enemy's hands, to carry on their duties under the enemy's direction; when their assistance should be no longer "indispensable," they were to be "sent back to their army or country, within such period and by such route as may accord with military necessity."²³ The Geneva (Red Cross) Convention of July 27, 1929, in its Article 9 repeated the rule quoted from the ninth article of the 1864 convention. By Article 12 of the 1929 instrument, chaplains are among those who "may not be detained after they have fallen into the power of the adversary," but, in the absence of agreement to the contrary, "shall be sent back to the belligerent to whose service they are attached as soon as a way is open for their return and military exigencies permit." However, "While waiting to be returned, they shall continue in the exercise of their functions under the direction of the adversary. . . ."²⁴

There continues to be some disagreement as to the precise status of chaplains. They have been said to belong "indirectly" to the armed forces.²⁵ It is too early to attempt any very final statement as to practice in the present war. Although the 1929 rules contemplate that chaplains, when captured, shall normally be detained only pending their repatriation, they may in fact remain in the prison camps and minister to their compatriots who are prisoners. This seems, for example, to be the course which captured British chaplains have followed in this war. They have not been repatriated, but have remained to provide religious ministrations to their fellow prisoners.²⁶

²² 22 Stat., 940. By the same article, when individuals thus allowed to continue in their duties in occupied territory should "cease from their functions," they were to be "delivered by the occupying army, to the outposts of the enemy." Additional Article I would have allowed some leeway to belligerents in the matter of allowing withdrawal of such persons, due to military necessities. A. Pearce Higgins, *The Hague Peace Conferences* (1909), p. 14.

²³ 35 Stat., Pt. 2, 1885. By Art. 13, they were to receive, while in the enemy's hands, the same allowance and pay as that granted to persons holding the same rank in the enemy's army.

²⁴ 47 Stat., Pt. 2, 2074. The principal belligerents in the current war are parties, all except Russia having ratified as signatories, and the Soviet Union having acceded on Sept. 26, 1931.

²⁵ Oppenheim, *Int. Law* (6th ed.) II (1940), p. 203.

²⁶ Statement from the British Library of Information, New York City. The Secretary of

The Prisoners of War Convention signed July 27, 1929, leaves the way open for them to continue in their duties, since, by Article 16, "Ministers of a religion, prisoners of war . . . shall be allowed to minister fully to members of the same religion."²⁷ Late in May, 1943, it was reported from the State Department that negotiations were under way for the exchange, between the United States and Japan, of "religious personnel," as well as seriously sick and wounded prisoners, and medical personnel.²⁸

The usage which developed into multilateral treaty rules reflected a mutual respect for the function of spiritual counsellors. Evidence of this respect is to be seen in the present war, particularly in the practice of States which make of religious freedom a basic principle. Those who minister to spiritual needs should have a status in law, international as well as national, in keeping with the high purpose which they are appointed to serve.

ROBERT R. WILSON

THE GUERRILLA AND THE LAWFUL COMBATANT

The word "guerrilla" has in recent months often been used. At times it has been used incorrectly as descriptive of a type of soldier having a belligerent status. The term has also been confused in designating a member of a *levée en masse*. Formerly a member of a *levée en masse* was not generally recognized as a lawful belligerent, but this has changed since the Declaration of Brussels, 1874, defined *levée en masse* as "The population of a non-occupied territory, who on the approach of the enemy, of their own accord take up arms to resist invading troops," without having had time to organize. Such combatants, if captured, now have status of prisoners of war.

The old idea was that the term "guerrilla" applied to one engaged in petty warfare. Such men were common during the Napoleonic wars, but later in the first half of the nineteenth century were found to be of grave danger to both parties because of lack of responsible control. At the time of the first edition of Woolsey's *Introduction to the Study of International Law*, 1860, the status had become sufficiently clear so that he could say, "Guerrilla parties, however, do not enjoy the full benefit of the laws of war."

It may not always be easy to determine when a guerrilla party is acting in

State for War said on Dec. 1, 1942, that chaplains who were prisoners in Germany and Italy were usually allowed to exercise their ministry in camps. He said that there was very little information concerning those in Japan, but that there was some evidence that services were held in camps where chaplains who had been captured at Hong Kong were interned. Parl. Deb., New Ser., Vol. 385, Commons, c. 1037-1038.

For a statement by a newspaper correspondent concerning the treatment of certain British chaplains, see Harold Denny, *Behind Both Lines* (1942), pp. 150-151, 157.

²⁷ 47 Stat., Pt. 2, 2021.

²⁸ U. S. Dept. of State Bulletin, May 29, 1943, p. 472: "Negotiations are . . . under way for the return and release of such captured sanitary and religious personnel as may not be needed to care for their compatriots who are prisoners of war." Cf., however, note 18, *supra*.

aid of the regular forces, but as the marks of a regular force in its uniform, flag, etc., are distinguishing, the burden of proof may properly rest upon the irregular party to establish its lawful identity if it expects treatment under the laws of war.

War is between States, and the forces entitled to the rights of the laws of war are those duly enrolled in State forces or at least under its control and for whose acts the State is responsible. Clearly then it is not for a party to enjoy at will the status of a belligerent at one moment and that of a non-combatant at another, without change in command or distinguishing mark.

Francis Lieber, whose *Instructions for the Government of Armies of the United States in the Field*, 1863, became the basis for subsequent rules, wrote a tract on "Guerrilla Parties" in response to a letter of General Halleck in 1862, which he concludes as follows:

So much is certain, that no army, no society, engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation, without the deepest injury to itself and disastrous consequences, which might change the very issue of the war.

GEORGE GRAFTON WILSON

PUNISHMENT OF WAR CRIMINALS BY THE UNITED NATIONS

The United Nations have committed themselves, though not as a collective group, to undertake the trial and punishment of Axis war criminals. They have the power to do so, whether as victors unrestrained by law,¹ or through the application of the law of war by their national military tribunals, or through their authority as military occupants. Neither the Anglo-Saxon peoples nor others of the United Nations look with favor upon arbitrary and *ex post facto* punishments, but they believe that many acts of individuals in Axis military forces are crimes, and should be punished as such. There are, in fact, enough precedents in the law of war, and enough "general principles of law recognized by civilized nations" to provide a just and proper legal procedure. The establishment of such a procedure should not be embarrassed by limited precedents, by past theories, or by fine-spun technicalities. On the other hand, it should be a restrained procedure, eliminating political purposes or mere revenge, and seeking to establish a few sound precedents for the law of the future, rather than to convict as many persons as possible. The community of nations has not, in the past, proclaimed with sufficient clarity rules and principles defining "war crimes," and it is

¹ Mr. Charles Warren, at the last meeting of the American Society of International Law, suggested that the question is a political one, rather than legal.

In the continuing struggle between law and force, law can be upheld only by the physical victory of those who believe in law; and the victor has the power as a matter of fact, not forbidden by law, to penalize the defeated nation and its war criminals, a power which has always been exercised, and not illegally, whether in the form of slaughter of opponents, or reparations, or expulsion to St. Helena.

both desirable and important that the United Nations should take a collective stand concerning punishment of war criminals, that they should enunciate the principles and procedure according to which they propose to administer punishment, and further, that they should make it clear that these are principles derived from international law, and not merely imposition of arbitrary and *ex post facto* penalties.)

First in importance among these steps is the announcement that action taken will be by the United Nations, and not by individual nations. This is essential for various reasons. If the punishment of war crimes is to be "through the channel of organized justice" then justice must be organized. The questions are at issue between States, and no one State can satisfactorily pass judgment upon itself or upon its enemy. This has been the method of the past; it is wrong in principle, and has not worked in practice. The procedure adopted should be in the name of the law and of the community of nations; the United Nations, together with neutrals of the same interest in law, represent an overwhelming majority of the peoples of the world. This procedure should be regarded as a development of international legal procedure, the rightful effort of the victors to build up international law and order. It should not be of such character as to lay against the victors the charge of national selfishness or bloody retribution. The crimes committed are crimes against the United Nations, indeed against all humanity; they are more than crimes against any one nation, and should not be open to punishment by any one nation. It is, further, important for future legal development to secure uniformity in definition, procedure, and penalties for war crimes, and this will not result from decisions by varied national tribunals. It is justice which should be administered, not revenge; and this calls for agreement among the United Nations, acting for the torn and disordered community of nations, as to what justice is.

Next in importance, doubtless, is the criteria by which war crimes are to be ascertained. If it is accepted, as it usually is, that the status of war in international law justifies a nation in the use of physical force, for whatever purpose,² the result is to make legitimate certain acts by individuals which would otherwise be ordinary crimes, punishable under the law of any or all nations. Such acts by individuals are justifiable only in so far as they are related to the winning of the war; other crimes, having no relation to the war, cannot be so justified; still other acts, even though perhaps useful for military purposes, are nevertheless forbidden by the international law of war.

With regard to acts which contravene definite provisions of the law of war, agreement should be reached in advance by the United Nations upon some criteria for the guidance of courts. Which of the rules of the law of war are

² I pass by, in this discussion, the argument advanced, with much reason, that war, or war for certain purposes, is illegal, and that consequently all acts committed in such a war are illegal.

to be enforced? In principle, that law seeks to excuse from punishment such acts as are necessary toward winning the war, and to restrain other acts of violence not essential for this purpose. In pursuance of this principle, it can be argued that changes in the instruments and methods of warfare have rendered obsolete many of the rules agreed upon by treaty, and that it is now difficult to say which, if any, of those rules can justly be used. The submarine and aeroplane have made usual the performance of acts which would be illegal under the Hague Conventions or other treaties; our own men now engage in such activities as a regular part of their functions. Where is the line to be drawn between the rules of the law of war which should be enforced, and those which should not be enforced? It is believed that the principle above enunciated furnishes the necessary guidance for judges. Certain acts, formerly regarded as illegal, may now, as a result of changes in weapons and methods of warfare, be considered as vitally important to the winning of the war, and thus the court may refuse to punish individuals who sink ships without warning and without saving lives, or who drop projectiles from above, or perhaps those who engage in wanton destruction as part of a "scorched earth" policy. Other acts, such perhaps as the murder of hostages and unoffending civilians, or rape, or wholesale theft of articles having no military value, could not be excused on the ground that they contribute to victory. Criteria can be found and should be agreed upon by the United Nations, for the selection of the rules to be enforced. There will remain a number of acts deserving of punishment sufficient to uphold international law and humane principles of conduct.

It is suggested also that the principle *respondeat superior* be in general accepted, and agreement reached to guide the court in applying it. It is said to be an axiom of English and American law that no person can escape responsibility for an illegal act on the plea that he was acting upon orders from a superior officer. However this may be, it is repugnant to the average person to think of punishing a soldier who, in the first place, would be ignorant of the legality or illegality of his act and, in the second place, would be shot immediately if he refused to obey the order to perform the illegal act. If we admit war as a procedure, we must admit the exceptional situations which it produces; the inferior who is ordered to commit an illegal act cannot resign rather than obey. There will be enough cases in which an individual acted without authority or in contravention of orders, or in which responsibility will be found to be located within the jurisdiction of one official and cannot be traced further. It is not the number of persons punished which is our objective or criterion; it is more important that definite legal precedents, based upon the application of the principles of international law to current situations, be established.

With regard to acts unrelated to the war, and to be regarded as ordinary crimes, there should again be agreement among the United Nations upon criteria for selection, and as to penalties to be imposed. Doubtless, each

victor State is now competent, through its military tribunals, to try offenders according to its own code of law; and doubtless such a military tribunal can call for the death penalty if it so decides. No one, however, wishes to try an enemy for selling cigarettes, nor to punish by death for drunkenness or petty thievery. Certain more heinous crimes, recognized as such in the criminal law of all States, should be selected, and prosecutions limited to these.

The question will necessarily and often arise in such cases as to whether the act complained of was really related to the conduct of war, and therefore not to be regarded as an ordinary crime. Certain principles were suggested in this connection by the American representatives to the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties which deserve careful consideration. The final and summarizing paragraph follows:

9. It would appear, therefore, in determining the criminality of an act, that there should be considered the wantonness or malice of the perpetrator, the needlessness of the act from a military point of view, the perpetration of a justifiable act in a needlessly harsh or cruel manner, and the improper motive which inspired it.³

If such a procedure should be agreed upon, it would seem to follow that international, rather than national, tribunals should hear the cases. Such tribunals would have to be constituted, and this would doubtless involve agreement among the United Nations transferring to United Nations tribunals some of the rights of trial possessed by national military tribunals. This should not be too much to ask, since it is manifestly a fairer procedure, and a better distribution of the burdens.⁴ It is preferable, in the effort to assure unquestioned and uncriticized justice, that national tribunals should be eliminated, and that judges from various States, including neutrals, should conduct trials. Doubtless, many tribunals will be needed, in various areas, and it would be helpful to have a final court of appeal whether for national or regional tribunals. Again, preliminary and prompt agreement among the United Nations is needed.

The procedure above suggested would reduce greatly the number of persons who might otherwise be brought to trial, and this, it is believed, would be a desirable result.⁵ The burden of punishing war criminals could easily become impossibly heavy unless some such restrictions are set. The value

³ Signed by Robert Lansing and James Brown Scott. This JOURNAL, Vol. 14 (1920), pp. 150-151.

⁴ But if it is too much to ask, the suggestion of Mr. Dickinson, made at the last meeting of the American Society of International Law, might be followed, to the effect that cases be handled through national courts or commissions in the first instance, with an international body established *ad hoc* to serve as a body of review or appeal.

⁵ See article by Viscount Sankey, entitled "War Criminals," in Fortnightly, January, 1943, p. 6.

of precedents would not be diminished because they would be few, but rather strengthened, because they would be solidly founded, and because they were uniformly issued, by the same rules of law and by the same procedure. Selection by the United Nations of the rules to be enforced is, it should be noted, not the making of new or retroactive law, but rather restriction of existing law. A further desirable result would be the universal impression of fairness and justice; it would seem to be the justice of an organized community, rather than the uncertain administration of justice by interested opponents, and in accordance with separate national codes. The opportunity for martyrdom would be diminished; charges of *ex post facto* action, of arbitrary or vengeful political measures—while they would doubtless not be absent—would be weakened through lack of the sort of justification offered by previous precedures.

Innumerable difficulties will arise in connection with the developing of the procedures above suggested, and no effort is here made to solve them. With regard to these, as well, agreement among the United Nations is imperative, and the suggestion made by Dr. Hyde at the last meeting of the American Society of International Law, that a conference of the United Nations be called soon to arrive at such an agreement, should receive wide support. No other procedure would be as satisfactory in this very difficult situation, and none so helpful in the reinforcement of international law.

CLYDE EAGLETON

NATIONAL SECURITY AND INTERNATIONAL POLICE

The problem of national security is generally acknowledged to rank first in the agenda of postwar planning. According to Mr. Forrest Davis, President Roosevelt "is concentrating on power; dealing with problems of power politics in contrast to what the pundits describe as welfare politics." Later in this article he says "Mr. Roosevelt's first concern is for security—'freedom from fear' . . . without the prospect of a 'durable peace' without agreement by the great Powers on administering and policing a peace, he feels that international economic understanding would be hard to reach."¹

Students of world politics generally agree upon this emphasis. National public opinions will demand that security be put first. If security does not exist, economic and social policies will not be directed toward increasing the welfare of the people but toward increasing the security of the State. Large portions of the national wealth will be devoted to armaments and economic policy will tend toward self-sufficiency. With such policies the standards of living will tend to decline.

It is true that a school of thought believes that the international pursuit of welfare policies, accompanied by educational effort, may induce peoples and governments to divert their attention from power, and that the problem of security will be solved by the moral regeneration of peoples and govern-

¹ Saturday Evening Post, April 10, 1943.

ments. The difficulty with this program lies in the fact that it must be successful permanently and universally, or it will not be successful at all. In proportion as such a program persuades many nations to devote their attention primarily to welfare, in a world where some aggressive nations remain, security will decline. This is true because in a world where each State is responsible for its own defense the opportunity for one or two nations to succeed in a policy of aggression will improve in proportion as the other nations devote their policies to economic welfare at the expense of military preparedness. Pursuit of welfare under such conditions is a policy of suicide. The instinct of governments and nations in putting security first is, therefore, justifiable. How can security be achieved?

It has been suggested that it is only necessary to disarm the present aggressors after their defeat and to reach agreement for collaboration among the United Nations to keep them disarmed. Doubtless such a policy will be carried out immediately after the war, but it would not suffice to prevent another war in a generation.² It is not probable that the present political alignments will continue. It may be recalled that two of the Axis Powers, Italy and Japan, were enemies of Germany in the first World War, while Turkey, an ally of Germany in that war, is now neutral. Furthermore, experience suggests that such a policy would stimulate the Axis Powers to revolt against the discrimination involved in this policy. The unequal disarmament of Germany under the Treaty of Versailles was an important element in Germany's revenge propaganda.

If the Axis Powers were permitted to recover economically as required by the Atlantic Charter, they would have the means for eventually rearming. With the motive and the means for rearming, only a very complete inspection and supervision by the United Nations could prevent the realization of rearmament by Germany. It is not to be anticipated that the unity and vigilance of the United Nations, necessary to maintain an efficient inspection and supervision, will endure if they continue only as a loose coalition formed primarily for the purpose of winning the war. The attention of democracies tends in time of peace to concentrate on domestic affairs. The inspection of German armaments, authorized by the Treaty of Versailles, rapidly became quite inadequate. With the Axis Powers augmenting both their desire and their capacity for revenge, with the United Nations declining in unity and vigilance, with some of the United Nations shifting to the Axis side, with the effectiveness of supervision of Axis armaments declining, the sense of security would rapidly decline.

Recognizing the difficulty of maintaining peace either by continuing for an indefinite period the preponderant force of the United Nations or by ignoring

² Edward P. Warner, *Future Control over German Aviation*, Foreign Affairs, April, 1943, p. 427 ff. In his article on "An International Police Force" (this JOURNAL, April, 1943, Vol. 37, p. 305) Admiral W. L. Rodgers assumes that such a force would be maintained by the United Nations against the Axis Powers.

the rôle of force in national security, outstanding statesmen have frequently suggested an international police force.³ This term has sometimes been used without precise definition, but probably more careful attention has been given in recent months to its meaning and to the possibility and desirability of realizing it than during or after any war of the past. Critics have emphasized both political and technical difficulties,⁴ while advocates have appealed both to history and to reason.⁵

Neither the difficulties nor the advantages of an international police force can be appraised unless compared with those inherent in alternative proposals. Force there will be in international relations, and six methods have been suggested for organizing it. These may be called (1) isolation, (2) self-help, (3) empire, (4) balance of power, (5) collective security, and (6) international police. All have been attempted at certain times and places, on some occasions with considerable success. The characteristics of each of the methods or policies, and the utility of each for solving the problem of national security in the conditions of technology and opinion likely to prevail after the war, will be briefly considered:

1. Isolation is the policy of relying upon geographical position and the absence of close economic and political contacts for security. There are few students of military and political affairs who believe that in the present age of airplanes, submarines and industrial dependence upon imported minerals, even the best located countries, such as the United States, can gain security by this policy. The Neutrality Acts of 1935-41 were the last gasps of American isolationism. When confronted by the reality of war in Europe and Asia, American opinion realized, as it had in 1917, that the United States would be in grave danger if the resources of Europe and Asia should come under the domination of one or two aggressive Powers.

2. Self-help is the policy which adds to the advantage of geographical position continual military preparedness to enable each State to deal with any possible aggression. Under present conditions, however, even the largest States cannot defend themselves against all possible coalitions of their neighbors. Policies of preparedness for self-help require under conditions of highly industrialized warfare a continually expanding *lebensraum* for each of the great Powers. Such expanding living spaces encroach upon one another and thus precipitate war for all and destroy the security of each.

3. Self-help, therefore, tends to beget a struggle among all the great Pow-

³ See above, note 1, and addresses by Sumner Welles, May 30, 1942, Nov. 2, 1942; Viscount Cranborne, June 2, 1942; Ambassador of China, Hu Shih, June 15, 1942; Ambassador John G. Winant, July 17, 1942 (United Nations Review, Supp. No. 1, "War and Peace Aims," January 1930, 1943, p. 44).

⁴ Admiral W. L. Rodgers, *op. cit.*

⁵ Lord Davies, House of Lords Debates, March 11, 1943, Col. 589 ff.; Address by David Lloyd George, January, 1943; Vice President Henry Wallace, American Magazine, March, 1943, p. 98.

ers for universal empire, a condition in which one State has emerged in a position to defend itself at the expense of the independence of all the others. Rome achieved this for a time in the ancient world. It is the policy which Charles V, Louis XIV, Napoleon, and now Hitler, struggled to achieve. But in each case the effort failed after bloody wars. Empire is a policy hostile to democracy, and in fact, the policy which the United Nations are fighting against today.

A review of these three policies suggests that in the modern world efforts to achieve security through isolation lead to efforts to achieve security through self-help. This, in turn, demands increasing empire. These policies are related to one another, all springing from the insistence that each nation shall enjoy complete sovereignty, and shall be alone responsible for its own defense. They are all incompatible with security in the contemporary world, unless indeed one State emerged with a universal empire. In that case the ideals of democracy and nationality would have been subverted.

4. The policy of balance of power implies that each State defends itself through parallel action or collaboration with its neighbors against any State which manifests signs of getting so powerful as to endanger the others. Balance of power policies may make use of military and economic preparation, of alliances and guarantees, of international commercial and financial measures, of territorial transfers and renunciations, and of preventive and remedial wars. The object of these devices, however, is always to prevent or frustrate the dangerous aggrandizement of any State in the system. Balance of power has been the policy pursued by most of the Powers during most of the period since the Renaissance. Great Britain generally assumed leadership in this policy, which yielded a high degree of security in the nineteenth century. It differs from pure self-help in that it implies a realization by each state that its security depends upon an equilibrium in the international system as a whole. Each State seeks security, not directly, by increasing its own strength, but indirectly by maintaining this equilibrium. Adherence to balance of power policies marks the beginning of the consciousness by each government of the unity of the system of States.⁶ Balance of power policies, however, cannot yield security today because of the development of total war, of the *blitzkrieg*, of economic interdependence, and of democracy. Democracies are fatally incapable of pursuing policies of military preparedness, of secret alliance, and of threatened war sufficiently in advance to frustrate the activities of the potential aggressor. Threats of war are idle unless supported by preparation for war, and in the present world such preparation requires years of stockpiling (because no country has all of the rare minerals it needs for military action), years during which civil liberties are sacrificed to military discipline (because total war requires detailed coördination of the activities of the entire population), and years during which economic welfare

⁶ Q. Wright, *A Study of War* (Chicago, 1942), p. 749 ff.

is sacrificed to taxes, tariffs and government regulations (because the economy must be diverted to military purposes and made invulnerable to blockade). The deliberation and discussion which is the essence of democracy is ill-adapted to the Machiavellian policy of secret diplomacy, bluff, and threat necessary for successful balancing of power under any circumstances, and particularly in a world where air-propelled *blitzkriegs* can overrun small or unprepared States in a few days, and military preparation requires the devotion of over half the economic resources to war.⁷

5. Collective security implies recognition of a juridical international order in which all States have agreed upon procedures for determining aggression and have agreed to collaborate by economic or military action in order to prevent it. This method for achieving security differs from that of balancing power in that each State recognizes that its security depends upon a juridical international order rather than upon a mere military equilibrium, and in that each State accepts permanent legal obligations of collective action rather than a mere policy of parallel or collaborative action. The experience of the League of Nations gives little hope that this system in itself will be adequate to create general security. Countries will not rely upon the good faith of all to carry out their sanctioning obligations in the emergency. If collective security fails to create general confidence, countries will still feel obliged to pursue policies of self-help or balance of power. China, Ethiopia, and Czechoslovakia relied upon collective security and were overrun. The world juridical order must rest upon something more efficient and reliable than the obligation of States to collaborate after the crisis has arisen, if the basic law forbidding aggression is to command or to deserve confidence. Potential aggressors will always anticipate the possibility of dividing the sanctioners while they gobble up smaller neighbors one at a time. Furthermore, even with complete good faith, the organization of collective military or economic action takes time, and an aggressor may hope to accomplish his object, at least for the time, before the forces of collective security can come to the aid of the victim. Collective security given two years might have worked to frustrate Mussolini's plans in Ethiopia; but Mussolini accelerated his program and Ethiopia was entirely occupied before Italy felt the economic pinch.

6. International police is a device whereby the international community as a whole is equipped with a permanent force disciplined and loyal to the international council, and sufficiently powerful to frustrate aggression by any government or probable combination of governments. The international community must be universal and permanent. If governments likely to commit aggression do not belong or can withdraw, the international police force would lack juridical competence to control them. Action against governments of non-member States would not be police but war. The or-

⁷ Q. Wright, "International Law and the Balance of Power," this JOURNAL, January 1943, Vol. 37, p. 97 ff.

ganization of a police force in the community is the device through which individuals have gained security in civilized societies, and through which States have gained security in federations. The difficulty lies in the inroads it makes upon national sovereignties, and the fear it arouses of a universal tyranny.

It is believed that air power, which has done so much to prevent security through self-help or through balance of power policies in the contemporary world, makes possible the development of an international police with a minimum of interference with national sovereignty and independence. If national military air forces were reduced or abandoned by agreement and a small international air force, based upon islands strategically located and convenient to the danger spots in the world, were established, the first steps toward an aggression could be frustrated. Because of its mobility and its control of the air the international force could be on the spot before the aggressor had begun his conquest. The international air force should be supplemented by obligations of each of the nations to come to the assistance of the victim of aggression with its land and naval forces, and through the utilization of economic sanctions. The existence of the international air force would, however, make the enormous difference between the forces of law and order being in time for preventive action and being too late to effect anything other than an eventual victory in a world war. In civil society the uniformed police force is small in proportion to the population. The ultimate force behind law is the determination of the average citizen that law shall prevail. But without the police force, an ever-ready spearpoint against crime, the citizens' determination is unavailing and anarchy exists.

The difficulties, legal, political and economic, of organizing security through an international police force cannot be minimized. Public opinion must be educated to realize that the sacrifices of sovereignty required by accepting an international police force will be less than the sacrifices of sovereignty involved in a succession of world wars. The latter seems the probable consequence of reliance upon any of the other methods of security. An international council to control the police force, and organs and procedures for determining aggression and for regulating and financing the police force, would also be necessary. If the world order is to free itself from the increasing instability of a purely military balance of power, it must establish jural and political checks and balances to preserve the flexibility and progressiveness only possible when there are many centers of initiative and to prevent the stagnation and tyranny of over-centralization.⁸

The statesmen who must plan for the postwar world cannot neglect public opinion. They must realize the strength of nationalism today and the reluctance which national publics will have to collaborate in setting up an international police force able to prevent aggression by their own country as well as by others. They must realize that such a police force implies the es-

⁸ Q. Wright, *A Study of War*, pp. 387 ff., 747.

establishment of representative political institutions in the world to manifest world public opinion and to organize and finance such a force.⁹ A political council appropriately representing the nations, with a procedure, preventing arbitrary action but permitting unified action in emergencies, must be established to control the police force.¹⁰ Statesmen must also realize that aggression must be defined and that a court or council must be created to apply such definition to particular cases expeditiously and decisively.¹¹ Facing these difficulties, however, statesmen must also realize that it is idle to make a plan in deference to public opinion which will not work. They must bear in mind the warning which Washington gave the Federal Convention in 1787: "It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and the honest can repair; and the rest is in the hand of God."

QUINCY WRIGHT

LAW AND RELIGION

Ever since Moses received the tablets of stone on Mount Sinai the supreme test of law has been whether it speaks with authority. The main cleavage in testing law has been between those who find that authority in human sovereignty and those who find it in divine sovereignty. Those who derive law from human wisdom identify it with legislative acts and government edicts. Such arts and edicts are commands which must be obeyed, but it is doubtful if they may be considered properly as law in the generic sense of *right*, *jus*, *recht*, and *droit*. They undoubtedly are laws but are not to be confused with systems of law.

This confusion of laws with *law* has been painfully evident of late in the field of international law. Any multipartite treaty, or legislation, or decisions by the League of Nations, have been deemed by some commentators to be the law of nations, whereas, in the opinion of the present commentator, they generally represent ephemeral, inconsistent, variable, and revocable compromises both of principles and law. There is clearly a vast difference between the Roman Law, the Code Napoleon, the Common Law, on the one hand, and the emanations of legislatures and diplomatic conventions,

⁹ The need of an opinion springing from the interest and conviction of individuals and not merely from the contract of governments is widely recognized. See Q. Wright, *ibid.*, pp. 1347-9; Rodgers, *op. cit.*, p. 307.

¹⁰ The organization and procedure in the Council would have to weigh influence with a realistic awareness of the political inequality of States. At the present time nearly two-thirds of the world's population is within the four principal United Nations. Probably each of these States should have a veto on the use of the International Police Force unless itself accused of aggression.

¹¹ See Q. Wright, "The Concept of Aggression in International Law," this JOURNAL, July 1935, Vol. 29, p. 373 ff.; "Test of Aggression in the Italo-Ethiopian War," *ibid.*, Jan. 1936, Vol. 30, p. 45 ff.

DEATH OF DR. JAMES BROWN SCOTT

Dr. James Brown Scott, a founder of the American Society of International Law in 1906 and of its *Journal* in 1907, died June 25 at Annapolis, Maryland, where he had made his home since his retirement three years ago. The first Secretary of the Society and Editor-in-Chief of the *Journal*, Dr. Scott retained both positions until 1924 when he resigned and was made Honorary Editor-in-Chief. In 1929, Dr. Scott was elected President of the Society and retired ten years later to become its Honorary President. His great services to international law and in behalf of the judicial settlement of international disputes will be the subject of later appropriate treatment in the columns of the *Journal*. These lines are merely notice of his passing to his friends and admirers all over the world. He was buried on June 28 in Arlington National Cemetery, in accordance with his wish. He had served as a volunteer in the Spanish-American War and was a Major, J.A.G.D., U. S. Army, during the first World War. For the present, we shall leave his memory in the peace which he so justly earned, with a few words taken from the eloquent eulogy pronounced over his flag-draped casket in the Fort Myer Chapel by his friend and associate of many years, the Rev. Edmund A. Walsh, S.J., Vice-President of Georgetown University and Regent of its School of Foreign Service, who conducted a simple but impressive non-sectarian service as Dr. Scott had requested him to do. Spoke Father Walsh:

Wherever on this distracted planet men still hold to the eternal verities underlying the temporal vicissitudes of human institutions, there the name of James Brown Scott will persist in the remembrance of kindred spirits, strengthening them to resist despair and out-face tyranny. . . . For upwards of forty years he has toiled, written, lectured, argued, voyaged and voyaged again to distant shores in support of one dominating thought. As early as 1906, while Solicitor for the Department of State, he launched his great crusade for the recovery of law from the bondage of those legal metaphysicians who would substitute expediency and the pragmatic sanction for the moral basis of jurisprudence. This school conceived law to be merely the transient and contemporaneous expression of changing social conditions, with no permanent core of unchanging principles. They had their day and now they have their pay—in the form of that cynical, totalitarian scourge which is reddening the horizons of the world with premeditated slaughter. Against that cult of material force, legal verbalism and opportunism James Brown Scott invoked the permanent, normal anchor of all law and world peace by re-issuing the Classics of International Law. He pointed to the rock of salvation—and led the way. . . . To this high mission his life was sealed. In this quest for international justice his days were wholly lived and his talents nobly spent. His memory will be forever green among those who knew him, revered him and loved him

GEORGE A. FINCH

CURRENT NOTE

THIRTY-SEVENTH ANNUAL MEETING OF THE SOCIETY

One of the most successful meetings of the American Society of International Law was held in Washington, April 30-May 1, at the Hotel Statler, in accordance with the notice printed in the last issue of the JOURNAL; and this notwithstanding that the Society again was meeting in the midst of a world war and under conditions which had made it doubtful whether there should be a meeting at all. The annual dinner with which the meeting closed as usual was the largest in the history of the Society, over three hundred members and their guests being present.

In opening the meeting on Friday evening, April 30, the President of the Society, Mr. Frederic R. Coudert, read a letter from President Roosevelt in which he said in part:

With war raging on all seas and in far-flung lands, we are face to face with the proposition that the alternative to such shocking destruction as exists today is a definite body of law accepted and followed by nations in their relations with each other. It is not sufficient to hope that international problems will automatically adjust themselves. We know too well that progress is achieved the hard way. Men on the battlefields are dying that civilization may be saved and that law by which we have learned to govern our conduct toward our neighbor, and not force, shall prevail. The body of law under which our civilization must advance must be a steadily growing one, tempered by past experience but capable of fulfilling the needs of a rapidly changing world. The world must have such law for its dependence. It cannot permit a recurrence of the present reign of lawlessness.

There has scarcely been a time when there was greater need than now for constructive thinking looking to the supremacy of law, justice and common decency in the relations between nations and their peoples. Learned organizations, such as your Society, are in a position to play a helpful part.

Mr. Coudert's presidential address, which followed the reading of the letter, dealt with the general subject of the meeting, namely, the reaffirmation and methods of implementation of the fundamental principles of international law. The address was acknowledged by the members who were privileged to hear it as in keeping with the high standard Mr. Coudert's predecessors in office had set and maintained from the very beginning of the Society. At the conclusion of his address, Mr. Coudert expressed the conviction that in order to effect a stable peace based upon law, the United States must coöperate to the full in establishing and sustaining:

1. An organization of the Community of Nations capable of maintaining and developing international law, preventing aggression, and affording means for necessary changes.

2. The organization of a judicial system of permanent international courts with obligatory jurisdiction over all international controversial matters properly and usually cognizable by judicial bodies.

The Honorable Francis B. Sayre, Special Assistant to the Secretary of State, followed with an inspiring address entitled "America, the Hope of the World," and the evening's program was concluded with a very interesting extemporaneous informal address by Sir Arthur Salter, Head of the British Merchant Shipping Mission at Washington, in which he made some very practical suggestions in regard to international coöperation after the present war based upon his experience during the last war.

"The Government of Occupied Territory" was the subject of the opening address on Saturday morning, May 1, by Brigadier General Cornelius W. Wickersham, of the United States Army, Commandant of the School of Military Government, Charlottesville, Virginia. General Wickersham's address dealt with practical problems involved in military occupation, and was ably discussed by Colonel Archibald King, J.A.G.D., United States Army, and others.

"The Punishment of War Criminals" was next on the program, and the leading paper was read by Dr. Charles Cheney Hyde, Professor of International Law and Diplomacy at Columbia University. The discussion of this paper was led by Dr. Edwin D. Dickinson, in which he was joined later by several other members of the Society.

The afternoon session on Saturday, May 1, was devoted to the "Treatment of Private Property of Aliens in Belligerent Territory." The leading address was delivered by Mr. John P. Bullington, of the Texas Bar, and the discussion was led by Mr. Mitchell Carroll, of the New York Bar. Several other members also joined in the discussion.

Following the formal program, there was a business meeting on Saturday afternoon at which Mr. Coudert was reëlected President, together with the other officers. The following members were added to the Executive Council to serve until 1946: Clarence A. Berdahl; Richard W. Flournoy; Archibald King; James Oliver Murdock; Fred K. Nielsen; Norman J. Padelford; Lawrence Preuss; and Durward V. Sandifer.

The draft resolutions proposed by a committee of officials and members of certain legal associations and societies which were printed in the last issue of the JOURNAL (April, 1943, p. 295), were submitted to the Society for adoption by Mr. Amos J. Peaslee, the Chairman of the Society's Committee on Coöperation with Other Societies. After considerable discussion as to the meaning of certain phrases, the resolutions were adopted in the following form:

Whereas, breaches of the international peace and the suppression of international lawlessness are matters of continuing common concern to the community of nations; and

Whereas, the United Nations have determined to prosecute the war

to a conclusive victory over the forces of aggression and inhumanity; and

Whereas, the building of institutions of peace is the most distinctive enterprise of our time; and

Whereas, the members of the legal profession, because of their specialized knowledge of the development of law and government, have a particular duty to contribute to the formulation of workable plans for the preservation of world peace and the solution of problems common to all nations;

Now, Therefore, be it Resolved

1. That a primary war and peace objective of the United Nations is the establishment and maintenance at the earliest possible moment of an effective international peace among all the nations based on law and the orderly administration of justice;

2. That the administration of international justice requires a permanent international judicial system with obligatory jurisdiction;

3. That instrumentalities, agencies and procedures should be instituted and developed to declare and make effective the considered will of the Community of Nations.

Since the war started in 1939, the Society has been cut off from communication with practically all of its European and Asiatic membership, and many members in the United States and the British Commonwealth of Nations have been forced to relinquish their memberships because of service in the armed forces or for other reasons. This loss of membership has reduced the Society's income to the point where it seemed necessary to take some remedial action. Acting upon the recommendations of a special committee appointed last year, the Society at its meeting this year decided to establish additional classes of membership in the hope of providing additional income. The new memberships may be best explained by reproducing the regulations adopted on this subject by the Executive Council as the result of the Society's action. They are as follows:

Contributing Members:

1. On the nomination of two members in regular standing and upon payment of ten dollars dues for each year, any person may be elected by the Executive Council a contributing member.

2. Any member of the Society heretofore elected may become a contributing member upon written notice to the Treasurer and payment of the annual sum of ten dollars if he has not yet paid his regular dues for the current year or five dollars if such dues have heretofore been paid.

3. Contributing members shall be entitled to all the privileges of annual members. The holders of these memberships will be designated as such in the roster of members.

4. Any contributing member may become an annual member upon written notice to the Treasurer before the expiration of the current year, and shall thereafter pay only the regular dues.

5. Upon failure to pay dues for one year a contributing member may in the discretion of the Executive Council be suspended or dropped from membership.

Supporting Members:

The regulations regarding contributing members apply *mutatis mutandis* to supporting members except that the annual dues for the latter class are twenty-five dollars.

Patrons:

1. Upon payment of five thousand dollars or more, or upon filing with the Executive Council of satisfactory evidence establishing that the Society has been made the beneficiary of such a sum, any person eligible for annual membership and any member heretofore elected may be elected by the Executive Council a Patron of the Society and shall have the full privileges of life membership. The above-mentioned payment or evidence shall be in lieu of dues.

2. A Patron of the Society shall continue to be indicated as such even after his death.

3. As a token of the Society's appreciation, the names of its Patrons shall be listed in each issue of the *Journal*.

4. Upon payment of five thousand dollars or more, or upon filing with the Executive Council of satisfactory evidence that the Society has been made the beneficiary of such a sum, the Executive Council may declare a deceased person to be a Patron of the Society posthumously. The name of such a person shall be listed as a Patron in each issue of the *Journal* under the heading "In Memoriam."

In addition, the Executive Council recommended that the fee for life membership be increased from one hundred to two hundred dollars. Receipts from all life memberships are invested and the income applied as annual dues. The income from an investment of one hundred dollars is now approximately only half of what it was when this form of membership was established years ago. It is hoped that the proposed increased amount will bring a return on the investment equivalent to the original amount intended. This recommendation of the Executive Council will be acted upon in the form of an amendment to the Constitution at the Society's next annual meeting.

At the closing dinner on Saturday evening, President Coudert presided as Toastmaster, and the speakers were Mr. Mitchell B. Carroll, Vice Chairman, Section of International and Comparative Law of the American Bar Association; Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States; His Excellency Dr. A. Loudon, Ambassador of The Netherlands; Major General E. M. Bethouart, Head of the French Military Mission; and Honorable Hugh Gibson, former American Ambassador to Belgium and Brazil.

The Proceedings of the meeting containing the full texts of all of the addresses and a verbatim account of the oral discussions have been printed and are available to members and subscribers at the regular price of \$1.50.

GEORGE A. FINCH

Secretary

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1943–MAY 15, 1943

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

January, 1943

- 20 CZECHOSLOVAKIAN RECOGNITION. Announcement made of intention to recognize the Government-in-exile by Colombia, Ecuador and Venezuela. *United Nations Review* (N. Y.), Feb. 15, 1943, p. 59.
- 22 POLAND. Sent note on German terrorism in Poland to Governments of the United Nations. Text: *Free Europe* (London), Feb. 12, 1943, pp. 63–64; *United Nations Review* (N. Y.), Feb. 15, 1943, p. 79; *Polish Review* (N. Y.), Feb. 8, 1943, p. 15.
- 29/February 15 CANADA—UNITED STATES. The 1943 Halibut Fishery Regulations, prepared by the International Fisheries Commission, were approved on behalf of Canada by an Order in Council of Jan. 29, 1943, and by the President of the United States on Feb. 15, 1943. *D. S. B.*, March 13, 1943, p. 224. Text: *Federal Register*, March 2, 1943, pp. 2608–2610.

February, 1943

- 5 CHINA—IRAQ. Exchanged ratifications at Ankara, Turkey, of the treaty of friendship signed March 16, 1942. *N. Y. Times*, Feb. 7, 1943, p. 18; *D. S. B.*, April 24, 1943, p. 355.
- 12 SWEDEN—UNITED STATES. Royal decree established deduction of 29% tax from dividends paid by Swedish corporations to foreign individuals. In accordance with the convention and protocol for avoidance of double taxation, signed March 23, 1939, the tax is limited to 10% for persons residing in the United States. *D. S. B.*, May 8, 1943, p. 422.
- 15 CHINA—NETHERLANDS (in exile). First Dutch Minister to China was appointed. *B. I. N.*, Feb. 20, 1943, p. 177.
- 18 CHIANG, KAI-SHEK, MADAME. Addressed the United States Congress. Texts of addresses: *Cong. Rec.* (daily), Feb. 18, 1943, pp. 1114 and 1142–1143.
- 18 PERU—UNITED STATES. Agreement signed by the Defense Supplies Corporation, a Reconstruction Finance Corporation subsidiary, and the Government of Peru, providing for an air transportation network to facilitate the rubber program. *D. S. B.*, Feb. 20, 1943, p. 175.
- 18 UNITED STATES—VENEZUELA. Effected health and sanitation agreement by exchange of notes at Caracas. A decree, issued March 26, 1943, by the President of Venezuela, created the *Oficina Cooperativa Interamericana de Salud Publica*, in accordance with terms of the agreement. *D. S. B.*, April 24, 1943, p. 354.

- 20 CHINA—SWEDEN. Announcement was made in Stockholm that Sweden will relinquish extraterritorial rights in China and has so notified China. *N. Y. Times*, Feb. 21, 1943, p. 5; *London Times*, Feb. 23, 1943, p. 3.
- 23 LEND-LEASE AGREEMENTS. List of countries with which the United States has agreements. *D. S. B.*, Feb. 27, 1943, p. 195.
- 23 NEW ZEALAND—UNITED STATES. New Zealand has accepted principles of the lend-lease agreement with Great Britain as governing its relations with the United States. *D. S. B.*, Feb. 27, 1943, p. 195.
- 24 AUSTRALIA—UNITED STATES. Australia has accepted the principles of the lend-lease agreement with Great Britain as governing its relations with the United States. *D. S. B.*, Feb. 27, 1943, p. 195.
- 25-May 7 POLAND—SOVIET RUSSIA. Polish Government in London maintained that the *status quo* respecting Poland's frontiers prior to Sept. 1, 1939, was in force. Text of statement: *London Times*, Feb. 26, 1943, p. 3; *N. Y. Times*, Feb. 26, 1943, p. 4. On Feb. 26 the Polish National Council issued statement containing second claim. *N. Y. Times*, Feb. 27, 1943, p. 4; *B. I. N.*, March 6, 1943, p. 227. The Czechoslovakian Ambassador to the United States declared March 10 his country would be ready to use its good offices in assisting to solve the Polish-Russian differences. *N. Y. Times*, March 11, 1943, p. 2. On March 1, the Soviet Embassy issued a statement by the Secretary of the Presidium of the Supreme Soviet regarding aims of the Red Army in respect to seizure of foreign countries or subjugation of other peoples. *B. I. N.*, March 6, 1943, p. 233. On March 4 the Polish Government authorized issuance of a statement in reply to Russian declaration of March 1. Text: *London Times*, March 5, 1943, p. 3. In a personal letter to a newspaper correspondent on May 4, Premier Stalin stated he wished for a strong free Poland after the war, and offered a mutual aid pact against Germany. Text of letter: *Russian Embassy Information Bulletin* (Washington), May 8, 1943, p. 1; *N. Y. Times*, May 6, 1943, pp. 1, 4. Radiophoto: *N. Y. Times*, May 7, 1943, p. 4. 4,000-word statement of Vice-Commissar for Foreign Affairs, dated May 6, accused Polish Government of espionage. The Polish Government replied May 7. Texts of both statements: *N. Y. Times*, May 8, 1943, p. 6. Polish statement: *London Times*, May 8, 1943, p. 3.

March, 1943

- 1 ATLANTIC CHARTER. Gen. Giraud at Algiers pledged adherence to the Charter. *N. Y. Times*, March 2, 1943, p. 8.
- 1 COMMUNICATION WITH PERSONS IN ENEMY TERRITORY. United States Department of State issued restrictions governing transmission of messages to or from enemy territory. Text of restrictions: *D. S. B.*, April 10, 1943, pp. 296-297.
- 2 ARGENTINA—GREAT BRITAIN. Decree authorized Argentine manufacture of arms, munitions, etc., for Great Britain with that country supplying the raw materials. *N. Y. Times*, March 3, 1943, p. 8; *B. I. N.*, March 20, 1943, p. 264.
- 2 CHILE—UNITED STATES. Signed mutual aid pact at Washington. Text is secret. *D. S. B.*, March 6, 1943, p. 208.
- 2 EGYPT—UNITED STATES. Signed agreement in Cairo concerning status of United States troops in Egypt. *N. Y. Times*, March 6, 1943, p. 3.
- 4 CANADA—UNITED STATES. Exchanged notes at Washington continuing in force the agreement of Dec. 3, 1940, regarding air transport services. Texts: *D. S. B.*, March 6, 1943, pp. 210-211; *Ex. Agr. Ser.* No. 314.

- 5 CHINA—POLAND (in exile). First Polish Ambassador presented his credentials. *N. Y. Times*, March 7, 1943, p. 31.
- 7/17 FRENCH NORTH AFRICA. Gen. Giraud's order of March 7 repudiated all decrees issued by Vichy since the armistice relative to the status of the native Jew in Algeria. *N. Y. Times*, March 8, 1943, p. 1. Text of order: p. 5. On March 17 Gen. Giraud repealed all anti-Jewish decrees, restored elective municipal assemblies, and issued five ordinances, one of which abrogated the Cremieux Decree of 1870. *N. Y. Times*, March 18, 1943, p. 5.
- 7/22 IRAQ—UNITED NATIONS. In Law No. 24, dated March 7, the Government of Iraq granted the forces of the United Nations, for the period of their presence in Iraq for purposes of the present war, the immunities and privileges enjoyed by British forces under par. 2 of the annex to the Treaty of Alliance between Iraq and Great Britain, concluded June 30, 1930. Despatch of March 22 reported Iraqi regulations had been issued in accordance with Law No. 24. *D. S. B.*, May 8, 1943, p. 421.
- 10 AUSTRALIA—SOVIET RUSSIA. Resumed diplomatic relations after a 30-year interval. *London Times*, March 11, 1943, p. 3; *B. I. N.*, March 20, 1943, p. 264.
- 10 GREAT BRITAIN—SWEDEN. Swedish Foreign Minister Gunther rejected British protests against Swedish construction of fishing boats for a German firm on the grounds they could be used as minesweepers. *N. Y. Times*, March 11, 1943, p. 8.
- 10 JAPAN—UNITED STATES. United States Department of State announced Japan had declared unacceptable the United States proposal for an exchange of their nationals on April 1. *N. Y. Times*, March 11, 1943, p. 4; *D. S. B.*, March 13, 1943, p. 217.
- 13 FRENCH UNITY. French National Committee announced memorandum of Feb. 23 to Gen. Giraud, asking incorporation of the administration of the territories in North and West Africa within the framework of the French National Committee. Summary: *B. I. N.*, March 20, 1943, p. 268. Text: *N. Y. Times*, March 14, 1943, p. 8; *London Times*, March 15, 1943, p. 3. Text of de Gaulle's message: *N. Y. Times*, March 16, 1943, p. 1.
- 15 FINLAND—GERMANY. Signed trade agreement. *B. I. N.*, March 20, 1943, p. 267.
- 16 BAHAMAS—UNITED STATES. Signed agreement for importation of agricultural workers into the United States. *D. S. B.*, April 10, 1943, p. 312.
- 18 MEXICO—UNITED STATES. Signed agreement at Washington regarding mutual aid in prosecution of the war. *D. S. B.*, March 20, 1943, p. 251.
- 18-April 10 FRENCH UNITY. Fighting French Military Mission in Washington announced allegiance of French Guiana to Gen. Giraud. *N. Y. Times*, March 19, 1943, pp. 1, 2. Lieut. Col. LeBel has taken over temporary control of the colony according to announcement of March 25. *N. Y. Times*, March 26, 1943, p. 4. On April 10 the French Mission at Washington announced restrictive measures against Jews in French Guiana had been ended. *N. Y. Times*, April 11, 1943, p. 33.
- 22 AXIS POWERS. Axis radios announced full agreement reached on a new order "based on justice and peace" and joint war efforts by representatives of Germany, Italy and Japan. *N. Y. Times*, March 23, 1943, p. 3; *London Times*, March 23, 1943, p. 3.
- 22 LEBANON. Announcement made that Gen. Catroux had proclaimed the restoration of the free constitution of the Republic of Lebanon. *London Times*, March 23, 1943, p. 3.

- 25 GREECE (in exile). Prime Minister Churchill of Great Britain announced that the Greek Government had moved to Cairo, Egypt. *N. Y. Times*, March 26, 1943, p. 5.
- 25 JAPAN—SOVIET RUSSIA. Signed protocol at Kuibyshev renewing for one year their fisheries pact. *N. Y. Times*, March 26, 1943, pp. 1, 4.
- 25 SYRIA. New government was formed. Free elections to be held within the next three months under government supervision. *London Times*, March 26, 1943, p. 3.

April, 1943

- 1 FRENCH UNITY. Gen. Giraud sent to Gen. de Gaulle a memorandum proposing a basis for French unity. Text: *N. Y. Times*, April 20, 1943, p. 4. On April 15 the Fighting French reply was sent to Gen. Giraud. *N. Y. Times*, April 21, 1943, p. 13. Text: *N. Y. Times*, April 22, 1943, p. 10; *London Times*, April 22, 1943, p. 3. Summary: *B. I. N.*, May 1, 1943, pp. 401-402.
- 1 PRIZES OF WAR. United States Presidential Proclamation No. 2582, extended to the Government of New Zealand reciprocal privileges with respect to prizes taken into each other's territorial waters. New Zealand had already consented to like treatment. *D. S. B.*, April 10, 1943, p. 296.
- 5 AMERICAN-MEXICAN CLAIMS COMMISSION. Edgar E. Witt, Charles McLaughlin and Samuel M. Gold took oaths of office as members of the Commission, established pursuant to provisions of the Settlement of Mexican Claims Act of 1942, approved Dec. 18, 1942. *D. S. B.*, May 8, 1943, p. 420.
- 5 JAMAICA—UNITED STATES. Announced signature of an agreement providing for importation of agricultural workers into the United States. *D. S. B.*, April 10, 1943, pp. 312-313.
- 7 PERMANENT COURT OF ARBITRATION. United States announced designation of Green H. Hackworth as a member, to succeed himself for a six-year term, terminating March 9, 1949. *D. S. B.*, April 10, 1943, p. 313.
- 7 WAR DECLARATION. Bolivia declared war on Axis Powers. *N. Y. Times*, April 8, 1943, pp. 1, 10; *B. I. N.*, April 17, 1943, p. 356.
- 8 IRAN—UNITED STATES. Signed reciprocal trade pact at Washington. *N. Y. Times*, April 9, 1943, p. 5; *D. S. B.*, April 10, 1943, p. 299. Analysis: pp. 300-312.
- 12/22 PRISONERS OF WAR. United States Department of State replied on April 12 to the Japanese Government's communication of Feb. 17, 1943, relative to Japanese treatment of American aviators. Text: *N. Y. Times*, April 22, 1943, p. 2; *D. S. B.*, April 24, 1943, pp. 337-339. On April 22 President Roosevelt issued statement announcing Japanese execution of United States prisoners of war and pledging punishment of those responsible. Text: *Cong. Record* (daily), April 22, 1943, p. 3738; *N. Y. Times*, April 22, 1943, p. 4; *D. S. B.*, April 24, 1943, p. 337.
- 16 MARTINIQUE. In a letter to the Associated Press, received in San Juan, Puerto Rico, Admiral Georges Robert outlined three conditions which would cause him to join the Allies against Germany. *N. Y. Times*, April 17, 1943, pp. 1, 4. Gen. Giraud's memo to Gen. de Gaulle of April 1 proposed control of Martinique. Summary: *N. Y. Times*, April 18, 1943, p. 25.
- 16 WORLD WAR—PEACE. Spanish Foreign Minister Gen. Count Gomez de Jordana stated that Spain is willing to offer good services in the cause of a speedy and just peace and to collaborate in the negotiation of treaties to lessen the danger of future wars. Excerpts: *N. Y. Times*, April 17, 1943, pp. 1, 5.

- 17 LEAGUE OF NATIONS—FRANCE. Announcement made that Gens. Giraud and de Gaulle still consider France a member of the League, thus repudiating the French withdrawal of April 19, 1941. *N. Y. Times*, April 18, 1943, p. 20; May 2, 1943, p. 21; *B. I. N.*, May 1, 1943, p. 401.
- 17-30 POLAND (in exile)—SOVIET RUSSIA. International Red Cross at Geneva acknowledged receipt of communications from the Polish Government in London and the German Red Cross requesting inquiry by an international committee on the discovery of Polish officers' bodies near Smolensk, the men having been captured during the 1939 campaign. *N. Y. Times*, April 20, 1943, p. 10; *London Times*, April 17, 1943, p. 3, and April 20, p. 4. Russian note of April 25 broke off diplomatic relations over the accusation that Russia had killed Polish army officers. *N. Y. Times*, April 27, 1943, p. 4; *London Times*, April 27, 1943, p. 4. Text: *Russian Embassy Information Bulletin* (Washington), April 29, 1943, p. 1. In a statement on April 28 the Polish Government again asked release of Poles in Russia and reaffirmed its loyalty to the United Nations. Text: *N. Y. Times*, April 29, 1943, p. 6; *London Times*, April 29, 1943, p. 3. Text of *Pravda* editorial denouncing the Sikorski régime: *N. Y. Times*, April 29, 1943, p. 7. As of April 30 Poland considered its request to the International Red Cross had lapsed. *London Times*, May 1, 1943, p. 4.
- 18 GERMANY—TURKEY. Signed barter agreement at Ankara. *N. Y. Times*, April 20, 1943, p. 10; *London Times*, April 22, 1943, p. 3.
- 19 GERMANY—SWEDEN. Swedish Foreign Office announced formal protest against German attack on Swedish submarine *Draken* in Swedish territorial waters. *N. Y. Times*, April 20, 1943, p. 7. According to the German radio, on April 23 Germany had rejected Sweden's protest. *B. I. N.*, May 1, 1943, p. 405. A new note to Germany on April 24 stated anchored mines had been found in territorial waters and warned that Swedish naval units had been ordered to take action on ships of any belligerent Power found committing warlike acts within Swedish territory. *B. I. N.*, May 1, 1943, p. 415.
- 19-29 REFUGEES CONFERENCE. British and American representatives met at Hamilton, Bermuda. Text of address of Chairman of American delegation: *D. S. B.*, April 24, 1943, pp. 351-353. It was agreed that mass migration is impossible. *N. Y. Times*, April 22, 1943, p. 10. Issued joint communiqué on April 29. Text: *D. S. B.*, May 1, 1943, p. 388; *N. Y. Times*, April 30, 1943, p. 9.
- PRISONERS OF WAR. British Foreign Secretary announced in House of Commons a reply to British note of Feb. 11 last to Germany (contents not made public. *London Times*, Feb. 12, 1943, p. 2), in which that Government stated different views on the shackling of prisoners and insisted on compliance with its earlier demand. Mr. Eden said his Government would continue to press for abandonment of shackling by Germany. *B. I. N.*, May 1, 1943, pp. 407-408; *London Times*, April 22, 1943, p. 8.
- 26/May 1 MARTINIQUE—UNITED STATES. By note of April 26 the United States severed political ties and abrogated all agreements with Martinique. *N. Y. Times*, May 1, 1943, p. 2. Text: *D. S. B.*, May 1, 1943, p. 359. Admiral Robert replied on May 1. Text: *N. Y. Times*, May 5, 1943, p. 4.
- 27/May 5 UNITED NATIONS DECLARATION—BOLIVIA. Bolivia adhered to the Declaration on April 27, and President Peñaranda signed the Declaration on May 5 during his stay in Washington. *D. S. B.*, May 8, 1943, p. 421.
- 27/May 7 FRENCH UNITY. Text of Gen. Giraud's note inviting Gen. de Gaulle to meet him at Marrakesh or Biskrah to discuss French unity: *N. Y. Times*, May 10, 1943,

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

UNITED STATES V. FULLARD-LEO, ET AL.*

February 1, 1943, as amended March 4, 1943

Action by the United States to quiet title to Palmyra Island situated about 900 miles south of Honolulu. Ownership claimed by the United States under cession of public lands from Hawaii at the time of its annexation in 1898. Private holders of record claim under conveyances from original explorers who took possession in 1862 by authority of and in the name of the King of the Hawaiian Islands, who, on June 18 of that year, proclaimed the island a part of his domain. Documentary proof of conveyance of title from the King to the original explorers could not be found and the private holders claimed under a lost grant.

Held: that title to the island was in the King of Hawaii who passed it to the United States by cession; that possession by private individuals and taxation of the island are not sufficient to sustain the claim of title by loss of grant. There must be proof of an adverse, exclusive and uninterrupted possession of 20 years, which was not established.

HEALY, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Territory of Hawaii; D. E. Metzger, Judge.

Action by the United States of America against Leslie Fullard-Leo and others to quiet title to Palmyra Island. From a judgment dismissing the action, the plaintiff appeals.

Reversed.

Before Garrecht, Haney, and Healy, Circuit Judges.

HANEY, Circuit Judge.

Appeal was taken from a judgment dismissing an action brought by appellant to quiet title to Palmyra Island.

Palmyra Island is an atoll comprising some 52 islets surrounding three deep-water lagoons, and is situated about 900 miles south of Honolulu. Many of the islets are covered with trees and tropical vegetation. It was discovered by Captain Sawle of the American ship *Palmyra* on November 6, 1802.

There was evidence, excluded by the court below, that one G. P. Judd, on October 19, 1859, visited the island and left "a bottle containing notice of taking possession."

Prior to February 26, 1862, Wilkinson and Bent, naturalized citizens of the Kingdom of Hawaii, made a "representation" to the Kingdom. The "representation" itself cannot be found. The minutes of a meeting of the Cabinet Council on February 26, 1862, contain the following:

P. Kamehameha read a Representation from Z Bent & Mr. Wilkinson, about the Island Palmyra, requesting that the Island should be considered a Hawaiian possession & be placed under the Hawaiian Flag.

After some discussion it pleased the King to direct the Minister of the Interior, to grant what the Petitioners apply for, following the precedent

* 133 F. 2d 743. *Certiorari* denied by the Supreme Court of the United States May 10, 1943.

of the Resolution regarding the Island Cornwallis & without exceeding the same.

The "precedent" referred to an expedition regarding a similar situation, the facts concerning which will be related before continuing the chronology of Palmyra Island.

The precedent of the resolution regarding Cornwallis Island was: On May 24, 1858, one Adams submitted a letter to the Minister of Interior stating that he was desirous of taking possession of an island or islands in the North Pacific in the name of the Hawaiian Government, provided that the Government would grant him certain rights. On May 31, 1858, Adams entered into a contract with the Minister of the Interior on behalf of the Hawaiian Government, by which Adams was given "the exclusive right for five years of taking guano or any other produce which may be found on any Island or Islands in the North Pacific Ocean taken possession of, in the name of His Majesty King . . . by Samuel Clesson Allen in the Schooner *Kalama*." There followed definite provisions respecting payment to the Government, operation of the business by Adams and avoidance of the contract by default. A provision below the signatures was "that if it shall afterwards appear, that any Island or Islands which have been taken possession of by L. C. Allen in the name of H. Majesty . . . had been previously taken possession of by a foreign power—then, this contract shall be void, so far as relates to such Island or Islands." On the same day a commission was issued to Allen empowering him to take possession in the name of the King "any Island or Islands in the North Pacific which are not in the possession of any other Government, or any other people. . . ."

On July 12, 1858, Allen reported that on June 14, 1858, he took possession of Cornwallis Island. The minutes of the Privy Council of July 27, 1858, disclose that the report was read, and a resolution adopted stating that the island was "to be considered as part of His Majesty's Domain."

The court below found that the contract with Adams "was rescinded by the Minister of Interior, as to Cornwallis Island, shortly thereafter when it was discovered that that island had been annexed by the United States prior to the time when Allen arrived there on June 14, 1858," and that the "Minister of Interior wrote to Adams on October 16, 1858, that the Government was embarrassed when it learned that the Island Cornwallis (later known as Johnston Island) taken under Allen's commission, had already been annexed by the United States."

Returning to the Wilkinson and Bent chronology, we find that on the day following the passage of the resolution, a newspaper in Honolulu contained the following:

The Sloop *Louisa* has been purchased by J. Wilkinson, and is now being fitted for a southern expedition, under command of Captain Zenas Bent. We understand she will take possession of an island during her cruise. . . .

On March 1, 1862, the Minister of the Interior wrote Wilkinson and Bent in part as follows:

. . . I am authorized to state on the part of His Majesty's Government that they consent to the taking possession of the island Palmyra . . . for the purpose of increasing the trade and commerce of this Kingdom, as well as offering protection to the interests of its subjects—

I have the honor to forward with this dispatch the authority . . . to take possession of the above mentioned island of Palmyra, and I beg to request that after having executed the orders contained in the commission, you will report the fact to this Department. . . .

The commission referred to was dated the same day, signed by the King and the Minister of the Interior and authorized Bent "to take possession in our name of Palmyra Island . . . not having been taken possession of by any other government or any other people." It also contained directions as to the method of taking possession, as follows: ". . . by erecting thereon a short pole, with the Hawaiian flag wrapped around it and interring at the foot thereof a bottle well corked containing a paper signed by him in the following form, viz.: 'Visited and taken possession of by order of His Majesty King Kamehameha IV, for him and his successors on the Hawaiian throne, by the undersigned . . . ' . . ."

A "Memoranda" published in the government gazette on June 14, 1862, stated that Captain Bent had sailed on March 28, 1862, and had arrived at Palmyra Island on April 6, 1862.

On June 16, 1862, Bent wrote the Minister of the Interior stating that he had taken "possession of Palmyra Island, in the name of His Majesty on April 15, 1862; that he left on the island one white man and four Hawaiians; that he planted some vegetables thereon; and that he proposed to return to the island in about ten days. On June 18, 1862, the Minister of the Interior published a "Proclamation" in the gazette reciting that Captain Bent had taken possession of Palmyra Island on April 15, 1862, and "This is to give notice, that the said island, so taken possession of, is henceforth to be considered and respected as part of the Domain of the King of the Hawaiian Islands."

Bent conveyed all his "right, title and interest" in the island to Wilkinson on December 24, 1862. In 1885, Pacific Navigation Company, a Hawaiian corporation, became a successor in interest to Wilkinson after previous conveyances. Assessment for taxes was made against the corporation in 1885, 1886, 1887, the valuation of the island being fixed at \$1,000. The corporation disposed of its interest in the island during the last named year, and no taxes were levied against the island until 1911.

Hawaii was a monarchy from 1795 to 1893 when the monarchy was abolished and after an intervening provisional government a republic was established. The joint resolution of Congress, approved July 7, 1898, 30 Stat. 750, recited that the Government of the Republic of Hawaii had consented

"to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands . . . and all other public property of every kind and description belonging to the Government of the Hawaiian Islands. . . ." It provided that the cession was accepted and that the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States." *Territory of Hawaii v. Mankichi*, 190 U. S. 197, 209, 23 S. Ct. 787, 47 L. Ed. 1016.

The court below stated that appellant had asked it to take judicial notice of "U. S. Senate Document 16, 55th Congress, 3rd Session. Message of the President of the United States transmitting the Report of the Hawaiian Commission in pursuance of the Joint Resolution to provide for annexing the Hawaiian Islands to the United States"; that in such document an itemized inventory of all government property and lands and interests in lands; that Palmyra Island is not listed as government property, but is listed as a part of the Hawaiian group; and that the report contains the following:

The Public Domain.—The statistics available in regard to the public lands belonging to the Republic of Hawaii at the time of the cession to the United States are not of that absolute or definite character that they can be accepted as conclusive of areas and values.

The frequent radical changes in the past years in the methods of control and of sales and leases and transfers of lands under the direction of the Crown . . . have made it difficult to arrive at exact figures. . . .

The court below also stated that the evidence showed that "extensive and exhaustive search has been made to ascertain if Palmyra Island was ever publicly designated, classified, or known as Crown land or public domain, during or after the time of the Monarchy. Nothing of the kind can be found."

On February 11, 1905, the Attorney General of the Territory of Hawaii wrote the Governor of the Territory in answer to a request by the Governor for an opinion as to the jurisdiction of the Territory over the various small guano islands to the northwest of Kauai. In it the Attorney General stated: "Palmyra Island seems to have been acquired during the reign of Kamehameha IV, by a proclamation signed by him, dated the 15th day of June, 1862." He further stated:

. . . I believe that from these records the government's right to lease the islands, or any privileges thereon, is clear; also to lease the same, as

suggested in your letter. The fact of making such leases, and the lessees taking possession thereunder, recognizing the Territory of Hawaii as the landlord would be *prima facie* evidence in international law of our right to the same and would be the best evidence the Government could make of its claim to the various islands in question.

In 1911, one Henry E. Cooper became the record owner of the island. In 1912, he filed a petition in the Land Court of the Territory, claiming ownership in fee simple, and praying for confirmation and registration of his title. The Territory, named as a respondent, by its Attorney General, filed a disclaimer of any interest in, to, or concerning the lands. On October 4, 1912, the Land Court made a decree declaring Cooper to be the owner in fee simple of the island. Assessments against the island for taxes have been made annually since 1911.

At the time of the decree a statute provided in part that the "laws of Hawaii relating to public lands . . . shall continue in force. . . ." 48 U.S.C.A. § 664. Rev. Laws of Hawaii, 1905, § 2395, provided in part:

A court is hereby established, to be called the court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of title to land within the Territory, with power to hear and determine all questions arising upon such applications, and also have jurisdiction over such other questions as may come before it under this chapter, subject, however, to the right of appeal, as herein-after provided. The proceedings upon such applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

Section 2431 provided in part:

. . . Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the Territory, whether mentioned by name in the application, notice or citation, or included in the general description "to all whom it may concern."

In 1922, Cooper conveyed a major portion of the island to Leslie and Ellen Fullard-Leo. On December 12, 1939, appellant filed in the court below an action to quiet title to Palmyra Island. The defendants named were Leslie and Ellen Fullard-Leo and the distributees of Cooper's estate. The petition alleged that the island became a part of the public or crown lands of the Kingdom of Hawaii on June 18, 1862; that the only interest in the island granted anyone, was the exclusive right to take guano and other produce from the island for five years, which right was granted Wilkinson and Bent in 1862; that title to the lands passed to appellant by cession by the Republic of Hawaii; that the Land Court which made the decree above mentioned, was without jurisdiction to enter a decree because no conveyance from the Kingdom, the Provisional Government, or the Republic of Hawaii, or from appellant was shown; and that appellant was not a party to the proceedings.

Jury trial was waived. The court below concluded that appellant had failed to establish its title, and dismissed the petition. This appeal followed.

Since the appellant alleged that it was the owner in fee simple of the island, it had the burden of establishing that ownership by a preponderance of the evidence. Appellant contends that it sustained that burden because: the island was proclaimed to be a part of the "domain" of the King, which meant absolute ownership; and that the King retained that absolute title, merely granting to Wilkinson and Bent the right to the produce from the island for five years. Appellees maintain that the proclamation that the island was a part of the "domain" of the King merely meant that it was under the "sovereignty" of the King and did not mean "ownership" in the King; that the "precedent" of Cornwallis Island meant only that Wilkinson and Bent could take possession of the island for the purpose of placing it under the sovereignty of the King only if it had not been taken possession of by any other government or people; and that in any event, the acquiescence by the governments of Hawaii in the private possession, and taxation of the island as private property, was sufficient to warrant a decision that the government of Hawaii parted with its title by a lost grant.

While it is possible, under principles of international law for two individuals to obtain title to such territory as they discover (see *Johnson v. McIntosh*, 8 Wheat. 543, 595, 21 U. S. 543, 595, 5 L. Ed. 681), such an occurrence is rare because title can also be obtained by conquest. 1 Hyde, *International Law*, 176 § 106. If the discovered land is important, many countries could and probably would acquire it by conquest, and the knowledge that such event might happen would deter most explorers. On the other hand, if the explorers take possession in behalf of a sovereignty, they are ordinarily able to salvage something of value from their effort with much less chance of losing it, depending, of course, on the strength of the sovereignty.

In the instant case, while the resolution of the Cabinet Council and the letter of March 1, 1862, addressed to Wilkinson and Bent by the Minister of Interior, may be equivocal on the point of ownership, there is nothing equivocal about the authority or commission issued to Bent. The commission makes it abundantly clear that Bent was merely acting as agent of the King. Under the principles of international law, the taking of possession by Bent perfected the title of the King. 1 Hyde, *International Law*, 167 § 100; 1 Oppenheim, *International Law*, 276-278, §§ 221-224; *Martin v. Waddell*, 16 Pet. 367, 409, 41 U. S. 367, 409, 10 L. Ed. 997. Nothing in the resolution or the letter referred to is contrary to that view.

Title being in the King, it passed to the United States by cession, unless it had been alienated by one of the Hawaiian governments. There is no proof of such alienation. Appellees contend, however, that possession by private individuals and taxation of the island are sufficient to warrant a decision that the alienation of the island was by a lost grant. By their answers

appellees prayed that their title be quieted. The court below failed to grant that relief, and while discussion of the question was not made, the record seems conclusive against granting such relief. To sustain the claim, there must be "proof of an adverse, exclusive, and uninterrupted possession for twenty years." *United States v. Chavez*, 175 U. S. 509, 522, 20 S. Ct. 159, 163, 44 L. Ed. 255. While there was some evidence of possession, there is no proof that it was adverse, exclusive or uninterrupted within the meaning of the rule.

Appellees also contend we should affirm because the findings are actually an opinion, but we believe they are sufficient.

Reversed.

HEALY, Circuit Judge (dissenting).

The burden of proof was on the United States to establish its title and its right of possession.¹ The trial court was of opinion that the burden had not been discharged. It found that while the sovereignty of the United States was extended over Palmyra Island by the annexation of Hawaii, the prior government of that country "did not in fact or in form assert fee simple title to this land at the time of annexation, or at any other time"; and that "petitioner does not exhibit a title which can be sustained." The bill was accordingly dismissed.

I think the dismissal was proper. The finding was not clearly erroneous, or erroneous at all. The long continued possession of the appellees and their predecessors in interest, under claim and color of right, was presumptive evidence of title in themselves² which I believe the showing in the record failed to overcome. The proof leaves it wholly uncertain whether, upon the annexation of Palmyra in 1862, the Hawaiian Kingdom regarded title thereto as having vested in itself, as the United States now claims that it did; or whether, on the contrary, the kingdom considered the island to be the property of the two men who sought its annexation. This was the crucial point in the case; and the doubtful situation ought to be, as it was by the trial court, resolved against the party on whom rested the burden of proof.³

1. Although early discovered, Palmyra Island remained for more than half a century unclaimed by any sovereignty. It was uninhabited, but was very far from being a desolate place. The climate was propitious, and there was a safe anchorage for ships. Trees grew on the island of the species of coconut, puhala, and the koa. The soil was fertile and capable of producing a great variety of crops, such as corn, beans, and melons; and the island appears besides to have been valuable because of the prevalence there of biche

¹ *United States v. Pennsylvania & Erie Dock Co.*, 6 Cir., 272 F. 839, 842; *United States v. Stinson*, 197 U. S. 200, 205, 25 S. Ct. 426, 49 L. Ed. 724; *Harrison v. Davis*, 22 Haw. 465, 466; *Kaluhiwa v. Miguel*, 25 Haw. 246, 250.

² *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 273, 36 L.R.A. 566; *Llewellyn v. Cauffiel*, 215 Pa. 23, 64 A. 388, 392; *Powhatan Coal Co. v. Ritz*, 60 W. Va. 395, 56 S.E. 257, 261, 9 L.R.A., N.S., 1225; *Swift v. Agnes*, 33 Wis. 228.

³ *Smith v. Royal Insurance Co.*, 9 Cir., 125 F. 2d 222, 224.

de mer, a sea slug much prized by the Chinese in the preparation of soup.

There is contemporaneous evidence that for several years prior to 1862 Bent and Wilkinson had manifested an interest in the island, and that they were familiar with conditions there. In the *Polynesian*, published at Honolulu, there appears under date of June 14, 1862, an account of the recent visit of Bent to Palmyra in the *Sloop Louisa*, from which account this earlier familiarity appears and in which it is stated that Bent "has been over the same locality every few months during the last five years." It was not shown that there was anything in the locality to attract these frequent visits other than interest in the island itself.

There is later evidence in the record to like effect. In a letter written by Cooper⁴ to Governor Frear in 1912 it was stated that "Captain Zenas Bent and J. Wilkinson settled on the island sometime in the late 50's and made considerable improvements thereon." This letter was admitted in evidence without objection, and indeed on the insistence of the Government. It is now attacked as self-serving. But Cooper's purpose in writing it, as is apparent from the context, was not to assert title in himself—a title which, incidentally, nobody was disputing—but to call the attention of the authorities to what the writer believed to be a threat of the extension of British sovereignty over the place.

Even stronger statements of a claimed right in Bent and Wilkinson antedating 1862 are contained in a letter of Governor Frear directed to the Secretary of the Interior at Washington. This letter, written in 1912, was likewise concerned with the supposed designs of the British. In it were enclosed copies of the documents relating to the events of 1862, which are in evidence here; and in the course of the communication Governor Frear stated that at the time of the annexation of the island Bent and Wilkinson were the "then-owners" of it. He further wrote that "the title to the island both as to sovereignty and as to private ownership would seem to be American without question"; and that title "has been from a date several years before 1862 to the present time in citizens of Hawaii and one Hawaiian corporation, successively."

The majority opinion ignores the *Polynesian* account and fails to mention these letters. It seems clear to me that they afford some evidence of a title based on earlier acts of possession. Both Frear and Cooper had resided in the islands for more than twenty years. Cooper had been a Circuit Judge and Secretary of the Territory. Frear was a lawyer of parts, having been made a Circuit Judge in the latter days of the Hawaiian Kingdom in 1893. In the same year he became a judge of the Supreme Court of that country, afterwards serving as Chief Justice. He was Governor of the Territory from 1907 until 1913.⁵

⁴ Cooper was the immediate grantor of appellees Fullard-Leo. He had acquired the island by purchase in 1911 and was one of the intermediate holders in the chain of title from Bent and Wilkinson.

⁵ The Americana, Volume 12, page 29.

It is argued that Governor Frear's statements merely parroted the assertion made in Cooper's letter; but we can not be sure of that. His statements are broader than those of Cooper, and he does not cite the Cooper letter as authority for them. It may be that his letter reflects his own interpretation of the documents in the Territorial archives. Too, it is possible that during the generation following the late 50's a tradition, now lost, was current in the islands concerning this early occupancy, and that both men were familiar with it. Frear is dead and Cooper is dead. In a situation such as the present, where the truth concerning ancient occurrences is obscured by time, the disappearance of documents, and the death of witnesses, declarations like these are entitled to a place in the general picture unless they are patently valueless or are refuted by the known facts.

The record contains, besides, internal evidence on the point. The "representation" of Bent and Wilkinson concerning Palmyra has been lost and we can not know definitely what was represented to the Council. But it is undeniable that the two asserted some interest in themselves for which they desired the protection of the Hawaiian Kingdom. In the letter of the King's Minister of March 1, 1862, acknowledging receipt of their petition and advising them of the granting of it, the Minister states the object of the action taken in these words: "for the purpose of increasing the trade and commerce of this Kingdom *as well as offering protection to the interests of its subjects.*" [Emphasis supplied.] No private interests other than those of Bent and Wilkinson were concerned in the matter, and it was necessarily the interests of those subjects which were to be afforded protection by the extension of Hawaiian sovereignty.

Following the annexation these men informed the Minister that they had planted crops, erected buildings, and were engaged in gathering and curing biche de mer. So far as appears, these activities, as well as their voyage to the island, were at their own expense; and there is nothing to show that they thought it essential to procure, or that they did in fact obtain, governmental permission for their occupancy or operations, or that they paid or became indebted for rentals or royalty. True, all this may be consistent with some sort of lessee relationship. But no lease appears; and the whole record is consistent with the recognition by the King of a proprietary right in the men themselves.

2. My associates appear largely to rest their holding on the wording of the commission issued to Bent and Wilkinson, which is said to be "unequivocal" on the point of ownership, and to make it "abundantly clear that Bent was merely acting as agent of the King."⁶ The holding, or so it seems to me, puts a heavy strain on the language of this document. To be sure, Bent was deputed as agent of the King; but for what purpose?

⁶ For convenience, the language of the commission is here repeated: "To all whom it may concern greeting: Know ye, that we have authorized and empowered our faithful subject Zenas Bent and by these presents, do hereby empower the said Zenas Bent to take possession

Words are inexact tools at best. Had Bent carried in his pocket a royal grant of the island in fee simple, the language of the commission would not have seemed to him incongruous; nor would it to anyone else. Like the wording of the later proclamation declaring that the island "is henceforth to be considered and respected as part of the Domain of the King of the Hawaiian Islands" ⁷—a declaration of which much is made by the Government—the language used is not inconsistent with the concurrent recognition of a private ownership.

The letter of the Minister accompanying the commission, and which must be considered in *pari materia* with it, is evidence that there was such recognition. It states that the consent of the Kingdom to the taking of possession of the island is in part for the purpose of "offering protection to the interests of its subjects," namely, Bent and Wilkinson. The most, I think, that can be said is that the language both of the commission and of the proclamation is equivocal, equally consistent with either theory. Certainly, its significance can not fairly be appraised apart from the setting in which these documents are found.

3. The resolution of the Cabinet Council to the effect that "it pleased the King to direct the Minister of the Interior, to grant what the petitioners apply for following the precedent of the resolution regarding the Island Cornwallis & without exceeding the same," is the chief item of proof on which the Government rests its case, it being argued that Bent and Wilkinson obtained thereby only a five-year contract to exploit the island. The majority appear not to take much stock in the argument, and in this I think they are right.

Had the resolution referred to the precedent of the *contract* given to Adams, there would be substance in the Government's contention. But the reference is to the precedent of the Cornwallis resolution, which makes no mention of a contract. The agreement of lease of Cornwallis Island was embodied in a separate instrument made at another time. There is nothing in the record from which one may infer that Bent or Wilkinson had knowledge of this contract, or that they were familiar with its terms.⁸ In the

in our name of Palmyra Island . . . , not having been taken possession of by any other government or any other people, by erecting thereon a short pole, with the Hawaiian flag wrapped round it and interring at the foot thereof, a bottle well corked containing a paper signed by him in the following form, viz.: 'Visited and taken possession of by order of his majesty King Kamehameha IV, for him and his Successors on the Hawaiian throne, by the undersigned in the Schooner Louisa this — day of 186—'."

⁷ Webster defines "domain" as meaning an estate held in possession, or as "the territory over which dominion or authority is exerted; the possession of a sovereign or commonwealth, or the like."

⁸ Four years and four months after the granting of the petition of Bent and Wilkinson the latter made his will devising to his wife his interest in Palmyra. It is somewhat unlikely that Wilkinson would have been at pains to mention the island if he had no more than a license so soon to expire, and which would in any event expire before distribution could be had. Distribution did not in fact occur prior to June, 1867.

Cornwallis matter it appears from his petition that Adams made no claim of proprietorship to any island, or indeed that he had any specific island in mind. He merely states that he "believes" he has information "of an island or islands in the north Pacific, on which are large deposits of guano."

It is fairly clear that the Cornwallis precedent was invoked as a limitation because of the embarrassment caused the kingdom by the circumstance, later developed, that Cornwallis Island had previously been taken possession of by the United States. I think the Cornwallis precedent is fully spelled out by the phrase "not having been taken possession of by any other government or any other people," inserted in the commission afterwards issued to Bent.

4. If Palmyra was claimed as public or crown land, one would expect to find some intimation thereof in the public acts of the Government. It is of the utmost importance, therefore, to inquire whether there is any evidence of such claim. As said in the majority opinion, exhaustive research has failed to reveal that the island was ever designated or known as crown land or as public land during the days of the monarchy.

The crown lands of the Kingdom, or the private lands of the King as they were earlier called, were constituted in 1848.⁹ A complete list of those lands is to be found in Revised Laws of Hawaii 1925, Volume 2, pages 2152-2156. The original list was never added to. If the island was public land, the Minister of the Interior was authorized by law to sell or lease it, Civil Code 1859, § 42. There is no evidence of a lease or a sale of the island. Nor, as already noted, is there evidence of any payment of rent or royalty by Bent and Wilkinson, or by their successors, in whose occupancy the monarchy appears to have acquiesced through all its after existence.

On the other side there is affirmative evidence that the Monarchy regarded the island as being private property. In the years 1885, 1886, and 1887 the Kingdom entered it on the assessment roll as the real property of the Pacific Navigation Company, whose title had been placed of record, and collected taxes thereon. The old tax records of the Kingdom appear to be incomplete, many of them being lost or missing, so that it can not be certainly known whether the island was thereafter assessed. In Territorial times, as has been seen, Governor Frear in an official letter recognized it to be private property. And in the years from 1911 to 1940 the Territory regularly assessed it for tax purposes.

Thus for the whole period of nearly eighty years neither the Kingdom nor the Republic, nor yet the United States, made any claim of title. On the contrary, by silent acquiescence and by public acts and declarations these successive governments recognized the proprietary claim of the private

⁹ The "Great Mahale" took place in 1845. At that time all individually occupied Hawaiian lands were held in feudal tenure. The Mahale substituted fee ownership. See Resolution of Oct. 26, 1846, 2 Hawaii, Kingdom Statutes, pp. 81-94. In 1848 the king transferred to the government most of his privately owned lands, those so transferred being thereafter held and disposed of as public lands.

occupants. As late as 1938, so the record shows, the authorities of the United States, through the Navy Department, entered into negotiations with appellees for a lease of the land—negotiations which were proceeding amicably and satisfactorily to both parties when, for the first time, it appears to have occurred to somebody in the government service that ownership was in the United States. As to the presumptions governing in a situation like this, see *Carino v. Insular Government of the P. I.*, 212 U. S. 449, 29 S. Ct. 334, 53 L. Ed. 594.

I have said there was never any claim of public ownership. The Government argues the contrary, predicating its argument on a report of the attorney general of the Territory made to the Governor in 1905. I would not notice this report were it not for the fact that the majority opinion quotes from it in such fashion as wholly to distort its meaning.

The report is copied in full on the margin.¹⁰ It will be noted that the governor's request for an opinion relates to "the various small guano islands

¹⁰ "In answer to your request of December 15th, 1904, for an opinion as to the jurisdiction of the Territory of Hawaii over the various small guano islands to the north-west of Kauai. I would reply as follows:

"After a careful investigation of the records in the office of the Secretary of the Territory, formerly the Foreign Office, and from other sources of information, I find that the authority of the Territory of Hawaii over these islands is as follows:

"It appears in the report of J. A. King, Minister of the Interior, dated the 2nd day of June, 1894, to Sanford B. Dole, President of the Republic of Hawaii, that formal possession was taken of Necker Island by the said J. A. King, representing the Republic of Hawaii, on May 22, 1894; it also appears by that report that the government of the Hawaiian Islands had sent Captain John Paty to take possession of said island about 1857; it also appears that he did take such possession at that time.

"Palmyra Island, seems to have been acquired during the reign of Kamehameha IV, by a proclamation signed by him, dated the 15th day of June, 1862.

"Lisiansky Island was taken by the government of the Hawaiian Islands through Capt. John Paty on the 10th day of May, 1857.

"Morell Island and Patrocínio or Byer Island were both taken for the Republic of Hawaii in 1898, by G. N. Wilcox, a Commissioner for that purpose appointed.

"While I was unable to find any official records of the acquisition of the other islands, the government has, for many years, assumed jurisdiction over them. The following leases have been made, from time to time, and have been undisputed:

"Lease of Necker Island, dated the 2nd day of June, 1904, to A. H. C. Lovekin, at \$25.00 per annum, term twenty-five years.

"Lease of J. A. King, Minister of the Interior, to the North Pacific Phosphate & Fertilizer Co. of Morell, Ocean, Pearl and Hermes reef, Midway and French Frigate Shoals, twenty-five years from the 15th day of February, 1894.

"Laysan and Lisiansky Islands to G. D. Freeth, April 17th, 1893.

"While it is to be regretted that the records of our foreign office are not more complete, possibly a more exhaustive search might find other documents which, in the present state of the old foreign office, it was impossible for me to find. I believe that from these records the government's right to lease the islands, or any privileges thereon, is clear; also to lease the same, as suggested in your letter. The fact of making such leases, and the lessees taking possession thereunder, recognizing the Territory of Hawaii as the landlord would be *prima facie* evidence in international law of our right to the same and would be the best evidence the government could make of its claim to the various islands in question."

to the northwest of Kauai." Kauai is one of the Hawaiian chain. Palmyra lies a thousand miles to the south of Kauai, so that it is not one of the islands on which an opinion was asked. Moreover, it is confessedly not a guano island. A glance at the map reveals that all the other islands mentioned in the report lie northwest of Kauai. The reference to Palmyra appears to be an inadvertence. The Attorney General's statement of his belief "that from these records the Government's right to lease the islands, or any privileges thereon, is clear," is expressly predicated on the precedent of the actual leases which his researches had disclosed. From a reading of the opinion as a whole, it is abundantly clear that, as regards Palmyra, the report not only fails to lend color to the Government's contention but is adverse to it.

5. It is unrealistic, I think, to attempt an appraisal of the legal implications of the annexation of Palmyra according to the usages of the law of nations. Until Cook's discovery in 1778 the Hawaiian archipelago was totally isolated from the world, its very existence being unknown. Thereafter until comparatively recent decades the contacts of its people with the older civilizations were casual and intermittent. The first known compilation of the laws of the Kingdom appeared in 1842; and in the later jurisprudence of the country the common and the civil law were sources of information, but they were without authority.¹¹

As stated by the trial court it is not known that the Kingdom had any law or fixed policy relating to the annexation of distant islands, or in respect of title to lands embraced in those annexed. And the judge justly commented on the unfettered authority of the King to prescribe the terms under which annexation should be made. In consenting to extend his dominion over Palmyra he possessed undoubted power to assent to any claim of right or ownership which might have been represented by these two subjects of his who petitioned for the island's annexation.

6. The trial court, content to rest its decision on the Government's lack of proof, appears not to have considered the bearing on the case of the 1912 decree of the Hawaiian Land Court.¹² Counsel, too, have not given the attention to the judgment in the Land Court proceeding to which I think it may be entitled. That court, having before it the identical questions of law, as well as of fact, presented here, adjudged title to the island to be in Cooper in fee simple.

The Territory of Hawaii had been made a party to the proceeding. It submitted to the jurisdiction, an appearance was entered on its behalf, and a disclaimer filed. The bearing of the Territory's disclaimer on the present suit by the United States is unclear. While the public and crown lands of Hawaii were ceded to the United States at the time of the annexa-

¹¹ *Waialua Co. v. Christian*, 305 U. S. 91, 107, 59 S. Ct. 21, 83 L. Ed. 60.

¹² Concerning the jurisdiction and power of the Land Court, see *In re Rosenbledt*, 24 Haw. 298, 307.

tion in 1898, nevertheless, with exceptions not here pertinent, these lands have always been held for the benefit of the people of the Territory, and they have remained "in the possession, use, and control" of the Territorial Government, to be "maintained, managed, and cared for by it . . . until . . . taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii." See § 91 Organic Act, 48 U.S.C.A. § 511; *Land Title, Kalena*, 34 Haw. 93, 98. Consult further 48 U.S.C.A. §§ 661 to 677. The United States has not heretofore been in the possession or occupancy of Palmyra, nor has it heretofore claimed the island by withdrawal or otherwise. That the Territory, in formally disclaiming any interest in Palmyra, was acting advisedly in the full consciousness of its rights and responsibilities in the premises, can not, I think, be doubted.¹³

In other situations, the Territory appears to have had recourse to its Land Court for the registration and confirmation of title to public lands where adverse claims had been asserted by private parties. See *In re Title of Kioloku*, 25 Haw. 357. There the Territory had petitioned the Land Court for confirmation of its title to a tract asserted to be public land. The court denied the petition and adjudged the title to be in the private claimant; and the Supreme Court affirmed the judgment on the appeal by the Territory. Was the United States thereafter free to take the land under the reserved power of the President contained in § 91 of the Organic Act, despite this solemn judgment adverse to the claim of the Territory? If so, the consequences to the security of Hawaiian titles are grave indeed. Compare *Land Title, Kalena*, *supra*. But if the judgment in the *Kioloku* case was conclusive of the proposition that the land involved was not public land, then the judgment in *Cooper's* case likewise concluded the question, unless it was obtained by fraud; and no fraud is charged. These problems which I have suggested are not merely questions lurking in the record; a consideration of them is vital to a decision if the finding of the trial court on the facts is not to be accepted.

If it be thought that the United States is in nowise concluded by judgments relating to unwithdrawn public lands in suits to which the Territory was a party, it does not follow, I think, that the judgment in the *Cooper* proceeding is thereby stripped of all authority. That judgment must be taken as a decision that the proof before the Land Court was as a matter of local law sufficient to establish fee title in *Cooper*. The same proof is presented here.

It was said in *Waialua Co. v. Christian*, 305 U. S. 91, 109, 59 S. Ct. 21, 30, 83 L. Ed. 60, that "while the 34th Section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference." It was thought that while the power was present to

¹³ Section 73 of the Organic Act, 48 U.S.C.A. § 664, continued in force the laws of Hawaii relating to public lands, the settlement of boundaries, etc. See 24 Op. Atty. Gen. 600.

reverse any ruling of the territorial court, on law or fact, the power should be exercised only in cases of manifest error. The court was speaking immediately of decisions of the territorial Supreme Court; but under later developments of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, I cannot but believe the principle applies with equal force to decisions of the inferior territorial courts. No territorial decision at variance with the determination of the Land Court in Cooper's case has been called to our attention. Moreover, that determination has support in the holding in *In re Title of Kioloku*, *supra*, in which case on analogous facts the court indulged the presumption of a lost grant.

BOOK REVIEWS

Papers Relating to the Foreign Relations of the United States: 1919. *The Paris Peace Conference*, Vol. I, pp. lxvi, 575, \$1.25; Vol. II, pp. lxxxiv, 812, \$1.50. Indices. Washington: Government Printing Office, 1942. *Papers, etc., 1928*, Vol. I (1942), pp. cxxiii, 1057, \$2.25; Vol. II (1943), pp. cxiv, 1024, \$2.00; Vol. III (1943), pp. cvi, 1006, \$2.00. Indices. Washington: Government Printing Office.

The appearance of the first two of a number of volumes which will provide official American records of the Paris Peace Conference comes at an opportune time. The Chief of the State Department's Division of Research and Publication observes in the preface that if the pitfalls of the period following the last war are to be avoided, it is "necessary . . . to have at hand while the next world settlement is in the making . . . full and authoritative information on the peacemaking of 1919" (I, iii). The Secretary of the American Commission of Inquiry for the Peace Conference (which had been set up under the direction of Colonel House in September, 1917) wrote to the Secretary of War in May, 1918, that "ignorance on the part of peace commissioners" in the past had "lost causes which have been won on the battlefield" (I, 98). The materials which are now available cover the period of preparation for the Peace Conference, and that from November 11, 1918, to the first meeting of the Council of Ten on January 12, 1919. Subsequent volumes will cover from this point to the departure of the American Commissioners from Paris on December 9, 1919.

In the course of the preparatory work, questions of international law received considerable attention, including such matters as intervention, equality of trade, and equality upon the high seas (I, 83, 93-4). There were, naturally, expressions of opinion upon the operation of rules during the conflict. As to rules concerning maritime commerce in war, the American Consul General at London recorded in November, 1918, his observation that "the shipper and owner of goods during the war now ended has been far less concerned respecting nice distinctions of international law than with the practical questions of administration," and that if it had been recognized in practice that the neutral shipper had rights and was entitled to a degree of consideration, "we should have heard much less than we did about infractions of international law." He further observed that the British had been running a twentieth century war with sixteenth century rules (I, 289). At about the same time the American who was Legal Adviser to the Chinese Government observed to the American Minister in China that the war had shown that in the future the safety of nations would rest, not in attempting to safeguard neutral rights, but in preventing war, since under modern conditions "neutrality means little in a great war even if the belligerents try to respect it" (II, 505). On the other hand, the technical military adviser to

the Commission to Negotiate Peace was of the opinion that the revision of rules concerning warfare and neutrality was an "urgent necessity" (I, 327-8).

Perhaps the most striking thing about these Peace Conference records is that they help to illumine many problems which are parallel with those beginning to come in for both popular and technical discussion today. Peacemakers of that time had to consider, for example, the necessity of destroying German influence over Finland (I, 362), difficulties in relation to self-determination or the "principle of nationalities" (I, 378, 379, 454, 460), interpretation of armistice clauses (II, 292, 322), the relaxation of wartime controls (II, 741), the repatriation of prisoners of war (there being, at the date of the armistice, nearly three million Russian prisoners in Germany and Austria, and nearly one and a quarter million German and Austrian prisoners in Russia and Siberia), the break-up of German morale and consequent depression, apathy and inertia in that country (II, 115-116, 133, 152), and many matters relating to property rights and expected reparations. Inter-Allied organization for relief was of pressing importance. The American Mission concluded that it was impossible to discuss the peace of the world until adequate measures had been taken to alleviate the fear of hunger (II, 714).

There is much useful information to be gleaned from these publications. The work of preparing and editing affords new evidence of the high standards which the Division of Research and Publication has set in the *Foreign Relations*. Later volumes in the series on the Peace Conference should be of great value to students of foreign policy, to specialists in international law, and to analysts of peace problems in general.

The State Department records for the year 1928, as now published, relate to a fairly uneventful year in American diplomatic history. The President told Congress in his annual message that the country could regard the present with satisfaction and anticipate the future with optimism. Perhaps the most spectacular undertaking was the conclusion of the Kellogg-Briand Pact for the Renunciation of War, the record of negotiations relating to which comprises 235 pages. Disapproving the idea of having a preliminary conference of jurists on the Pact, the Secretary of State took the position that the main question was not juridical but political, that a committee of jurists would spend their time trying to find out why it could not be done, that it was not "that kind" (*i.e.*, a jurists' kind) of a treaty (I, 58, 63, 85, 103). Discussions concerning the Pact elicited, among many others, the statement, from the British Secretary of State for Foreign Affairs, that the so-called British Monroe Doctrine was brought in only to reassure Parliament over Egypt (I, 74). Selection of the States which were to be original signatories of the Pact came to be a matter of some importance.

In conformity to the plan now regularly followed, "general" matters are distinguished from those involving only one other country. Under this classification are discussions relating to armament. Alleged relation to domestic politics sometimes figured in the discussions. For example, after a

representative of the United States, attending meetings of the Special Commission for the Preparation of a Draft Convention on the Private Manufacture of Arms and Ammunition and of Implements of War, had spoken in favor of publicity concerning armament construction, the French Delegate remarked to him that he "had thought that the elections in the United States were over" (I, 328). The Havana Conference on Emigration and Immigration furnished occasion for a statement as to the traditional position of the United States on this subject (I, 515, 562, 564, 573). The Sixth General Conference of the American Republics provided opportunity for expression of views of the Government of that time concerning intervention (I, 578) and on proposals for an American Permanent International Court and a Pan American League of Nations (I, 573, 575).

Under the section "China" are nearly five hundred pages of material, recording, among other things, suspicions of Japan's motives in that country (as at II, 166, 228), and the work of the Sino-American Joint Reparation Commission. Of the 174 pages devoted to relations with Nicaragua, about two-thirds have to do with American supervision of Nicaraguan elections, while much of the remainder relates to coöperation in re-arranging the finances of Nicaragua, and to operations against Sandino.

The year 1928 was the one in which the United States in its relations with non-American States sought to replace its Root treaties of thirty years before with newer type arbitration agreements (along with bilateral conciliation conventions). The record of the negotiations affords instructive material on the substantive content of these instruments, *e.g.*, the scope of the obligations as compared with those under the Root treaties (II, 864, III, 145), the meaning of "equity" as that word occurs in the treaties (II, 687, III, 146, 757-9), the reservation of questions within domestic jurisdiction (II, 865, 866, III, 949-50), the meaning of clauses concerning exhaustion of diplomatic efforts to settle (III, 146), and the effect of invoking a treaty for questions which might be in the course of adjudication in national courts (III, 760). The United States sought to conclude treaties in identical form with other States outside this hemisphere, without modifications or the adoption of different procedures "to satisfy each country's peculiar susceptibilities and apprehensions" (III, 759, 947, 948). These efforts were not uniformly successful. Negotiations with Japan and with Turkey did not result in signed treaties. Spain replied that she had adopted as standard in her treaties a formula that embraced all disputes and conflicts without any exception whatsoever, and that she could not accept what the United States proposed (III, 880). While concluding one of the desired treaties with the United States, Denmark would have preferred one with less limitations (II, 719).

In the Western Hemisphere a step was taken at the Sixth Pan American Conference to call the conference (later held at Washington) which produced the inter-American conciliation and arbitration treaties of 1929. The move furnished occasion for an official Mexican statement to the effect that that

republic had little confidence in the efficacy of obligatory arbitration as between Mexico and a more powerful country (II, 636). In the field of practical peaceful settlement the Secretary of State functioned in the course of the year as a mediator in a dispute between Guatemala and Honduras.

In addition to the larger political developments and the making of treaties, there are in the volumes for 1928 many references to technical questions of international law, involving, *e.g.*, acts constituting recognition (II, 192, 193, 196, 642), ownership of stock in a foreign corporation by a State's nationals as ground for reclamation against the chartering State (II, 611, 628, 633), or against a third State through whose public act alleged damage occurred (II, 957, 969, 970), national treatment provisions of treaties in relation to an excise on foreign-built boats (II, 940, 942, 943), and sovereignty over leased areas (III, 663, 674, 679, 680).

ROBERT R. WILSON

Soviet Russia's Foreign Policy, 1939-1942. By David J. Dallin. Translated by Leon Dennen. New Haven: Yale University Press, 1942. pp. xx, 452. Maps. Index. \$3.75.

For well over a decade the English-speaking world has been bereft of a comprehensive treatment of the evolving foreign policy of the land of the Soviets. Not even the much touted *Mission to Moscow*, validated on the strategic side by its military prescience, adequately covers the confused period leading to World War II. This great gap, particularly along the minor fronts of the diplomacy of the lesser Powers, is skilfully closed by the volume under review, which essentially covers the history-making days between the Pact of Munich and the opening of the Second Front in North Africa. For such a task Dr. Dallin was prepared by three decades of study and observation. Driven from his homeland in 1909, learning at Berlin and Heidelberg in the days before World War I the techniques of scholarship, returning to Soviet Russia for four years of activity as an "opposition deputy" in the Moscow Soviet, followed by another 22 years of exile in Poland, Germany, France and the United States, the author matured his views and synthesized his outlook in a very broadening milieu. From such a background *Soviet Russia's Foreign Policy* emerges.

Deftly picturing the stage setting in the spring of 1939, Dr. Dallin successively reviews in great detail the hectic negotiations preceding the outbreak of World War II. Following the breakdown of the collective security system, the U.S.S.R. was confronted with the problem of finding alternative protection, either through out-and-out alliances, or territorial acquisitions, or both. Finding Britain and France unwilling to enter a clear-cut alliance, Stalin took the alternate course and, after the Pact of Moscow, began to build up a barrier zone of annexed territory from the Gulf of Finland to the Black Sea. Only in Finland did he fail to get his way bloodlessly. With methodical precision and rigorous observance of the requisites of an exact chronology, Dr. Dallin traces the developments in the initial delimitation of

Russian and German spheres of interest in Eastern Europe, then notes, with meticulous fidelity, the beginning of the Russo-German stalemate in the Balkans after the end of the *Blitzkrieg* in the West. Perhaps the most effective chapter is that depicting the diplomatic moves by which Hitler built up the great anti-Soviet coalition previous to June 22, 1941. What the consequences of the Russo-German war involved in the way of diplomatic reorientation the author brings fully to light down to the end of October, 1942. Nor does he neglect the rôle of Russia as both a European and an Asiatic Power. The two chapters dealing with Soviet-Japanese relations are excellent, but the treatment of contacts with China appears, regrettably, decidedly thin.

Fearlessly facing the problem of evaluation of sources, knowing that it may be many years before the archives of the period become available, Dr. Dallin utilizes with uncommon skill a great variety of source materials—reports of war correspondents, parliamentary debates, editorials, broadcasts, communiqués, even headlines—to build up a well-rounded schematic mosaic of facts, set always in the matrix of the prevailing public opinion of both totalitarian and free press States. The author reveals himself in these pages as a sort of *ci-devant* Menshevik, a staunch upholder of the balance of power, a sharp but objective critic of Stalinism, but withal a sage interpreter of the vagaries of Soviet psychology. Probably the most significant contributions of the volume are its description of the spirit and techniques of Soviet isolationism (pp. xii-xix, 126-130, 351), of the theory of the Third Power underlying the moves of Soviet diplomacy, and the phasal treatment of great complexes of events (pp. 199, 381-382). All told, Dr. Dallin has produced a vital and interesting initial synthesis, which may not be altered for a considerable time to come, of a difficult and complicated period and area in international diplomacy.

MALBONE W. GRAHAM

Principles of Private International Law. By Arthur Nussbaum. New York, London, Toronto: Oxford University Press, 1943. pp. xvi, 288. Index. \$3.50.

The author here presents a discussion of common law principles of private international law, or conflict of laws, against a civil law background. For this he is well qualified by his teaching experience within the same field in Germany prior to his arrival in this country. His *Deutsches Internationales Privatrecht* published in 1932 is well known to scholars abroad. The author departs from the usual practice of writers both here and abroad of arranging the discussion under the various divisions of private law. Instead he divides the material into three parts, *viz.*, general questions, the "choice-of-law rule," and procedural questions. The second part would have been an appropriate place for a systematic division of subject-matter. Without this, the discussion becomes a series of essays upon various problems which the author considers outstanding, and for which jurisprudence and legislation serve as

illustrative of what the author regards as the correct or the erroneous principle as the case may be. It is true that certain parts of the discussion are grouped about a single subject, such as conflicts within the law of contracts; but this is the exception rather than the rule. There is an undoubted advantage to the author by this method as it permits him to develop his views without the diversion required by a comprehensive treatment of any one branch of law. Whether the reader gains a corresponding advantage is doubtful, especially because the facts of the illustrative cases are not supplied with sufficient detail to allow the reader to determine whether the cases substantiate the author's conclusions.

The author is critical of the Conflict of Laws Restatement. He believes that it "suffers from a rigidly conceptualistic attitude and not infrequently drifts away from the cases" (p. 65). His strictures on the insistence made in the Restatement and by Beale on the *lex loci contractus*, even against the intent of the parties, are well worthy of consideration. Here too a wider insight into the facts of the leading cases would have clarified the argument for practitioners in the law, if not for the academic reader. The author is equally averse to the Restatement's acceptance of the common law doctrine of the recognition of foreign judgments without reciprocity. The condition of reciprocity was injected by the Supreme Court into our Federal law in *Hilton v. Guyot* by an act of pure judicial legislation. The repudiation of that doctrine by the New York Court of Appeals and some other State courts has shown that the Restatement was eminently justified in providing (§ 6) that "The rules of Conflict of Laws of a state are not affected by the attitude of another state toward rights or interests created in the former state." Curiously enough the author pronounces with great fervor against what he calls "the law-of-nations doctrine" in the conflict of laws (p. 25), and yet this would seem to be the very basis for reciprocity. The author believes that "The rise of totalitarian régimes, with their cataclysmic changes in the position of the judiciary, renders it definitely clear that it is impossible to commit the domestic judiciary to a general and unconditional recognition of foreign judgments" (p. 232). This has little to do with reciprocity. Perhaps it is another way of saying that domestic judicial processes shall not be used for spoliation under the guise of applying a foreign law or a foreign vested right.

ARTHUR K. KUHN

The Question of Expatriation in America Prior to 1907. By I-Mien Tsiang. Baltimore: Johns Hopkins Press, 1942. pp. 128. Paper, \$1.50; cloth, \$2.25.

In this monograph the author has undertaken to trace the history of the American doctrine of expatriation from its uncertain beginnings in the common law doctrine of perpetual allegiance, hardly reconcilable with the severance of the bond of nationality in the Declaration of Independence, down to the Act of 1907, the first legislative definition of expatriation from

American citizenship. In the course of this historical account he deals with the varying views of the Fathers, particularly Jefferson and Hamilton, and with the difficulties of the courts and the executive departments in dealing with the question of the effect (a) of American naturalization on original allegiance, and (b) of the power of the American citizen to divest himself of American citizenship. The attempts and hesitations of Congress to legislate are usefully recounted and explained. The political reasons, domestic and foreign, supporting the American positions from time to time are well presented. While much of the material is already known to the student, the author has consulted Congressional debates and manuscript sources in the National Archives (Department of State) and papers in the Library of Congress to supplement the more accessible data. The story is succinctly and entertainingly told, and the scholarly apparatus does not impair the reader's interest. The style is good, the evidence precise and the political background adequate. Notwithstanding some typographical errors, the author has done a creditable piece of work.

If suggestions are permissible, it seems unfortunate that the story should have been stopped in 1907. That Act proved difficult to administer, particularly in determining how to overcome the presumption of expatriation. Activities of naturalized citizens abroad which would not be deemed expatriation (p. 106) were considerably broadened in later years. No reference is made to the fact that the magniloquent language of the Act of 1868, while it possibly served a useful purpose in helping to persuade some foreign countries to yield to the American view and give up their claims to the continued allegiance of a citizen when naturalized in the United States, has been somewhat tarnished by evidence that expatriation is apparently not now regarded in Congress as the "natural and inherent right of all people," *e.g.*, by the restrictive immigration policy beginning with the Chinese in 1882, by prohibiting expatriation in time of war, by defining naturalization, the oath of allegiance and certain service to foreign countries as the only recognized methods of expatriation, all of which indicate that the State even here is not entirely disinterested in expatriation. Although the American criticism of the draft treaty submitted to the plenary session at The Hague in 1930, providing for expatriation certificates, may be deemed in questionable taste, the liberal American policy in comparison with some others is still a matter for national pride. We do not banish citizens. While the American policy is rooted in the traditional individualistic attitudes reflected in the Bill of Rights and nurtured in 19th century philosophy, and while few citizens will probably seek to abjure American allegiance in the early future, there are political forces at work in the world militating against liberalism.

If the author's story were continued, some mention might have been made of the loose provision of the Act of 1907 relating to the expatriation of married women, which took no account of the possibility of their not

acquiring their husband's nationality by his law; of the new policy introduced by the Act of 1922 and its later amendments; of the Act of 1934; and of the numerous changes, particularly from presumption to actual expatriation, introduced by the Nationality Act of 1940. The difference between Buchanan and other Secretaries of State lay in his insistence that American citizenship by naturalization could and should be enforced in the native country regardless of the latter's opposing views on the question of expatriation and jurisdiction, both territorial and personal. Other Secretaries were more troubled by the inability of the United States to force its views of a politically debatable but legally undebatable question on foreign countries. That difference was manifest in the Theodore Roosevelt-Flournoy controversy in the 1915 *Cosmopolitan* magazine. The Protocol of 1930 (this JOURNAL, Vol. 32, p. 127), now in force among the United States, Great Britain, Brazil, India, Sweden, Australia, El Salvador, South Africa, Cuba, Colombia and The Netherlands (with some of which we have naturalization treaties), constituted some recognition for the American policy of single military service in cases of dual nationality (this JOURNAL, Supp., Vol. 24, p. 201), with respect to certain non-Bancroft-Treaty States. The municipal law of France and Italy—important States not signatories—has since relaxed some of its claims to the military service of those who, even without state consent, have acquired another nationality.

EDWIN BORCHARD

International Agreements on Conservation of Marine Resources. By Jozo Tomasevich. Stanford University: Food Research Institute, 1943. pp. xi, 297. Index. \$3.00.

This volume, the second to be published by the Food Research Institute on the subject of marine resources, has as its function, according to the book-jacket, the presentation of the subject "in historical and technological perspective, to economists and statesmen," since it has been "the concern of fisheries experts, conservationists, and international lawyers." Long a field for international legislation, the protection of the products of the sea has been complicated by the strong economic pressures resulting from the groups which have come to look upon marine resources as their source of livelihood. Tomasevich, accordingly, fills the gap in the literature on this subject in so far as he analyzes the international legislation in terms of its effect on the industries involved, and in turn the influences which the industries have exerted upon the agreements ultimately adopted by the States. In addition, the book seeks to evaluate the international agreements with which it treats in terms of their actual effect upon the resources which they seek to protect.

This book is not a treatise on the international law involved in fisheries on the high seas, and accordingly many will quarrel with the conclusions made by Tomasevich on existing international law. For example, after

referring to the erroneous concept of early times which considered resources of the sea inexhaustible and accordingly led to reckless exploitation, the author concludes that this erroneous concept "was responsible for the development of various practices and customs in exploitation of high seas fisheries that are recognized as rules of international law" (pp. 3-4, italics inserted). The rules of international law pertaining to the seas developed from the need for open lanes for commerce, and in so far as the regulation of fisheries on the high seas interferes with the trade routes there has been a reluctance on the part of maritime States to permit regulation on the high seas for conservation purposes.

Other statements dealing with international law are equally vulnerable, among which the following is illustrative: "Although some states and some writers have often tried to give the 3-mile limit the character of a general rule of international law, it has by no means such standing" (p. 22). Although it is true that the writers upon whom Tomasevich bases this statement have reached this conclusion, it is equally true that many other reputable writers and considerable state practice tend to refute this point of view. In fact, it is difficult to point to instances where a claim to a more extensive territorial sea than three miles has been sustained in the face of opposition from the principal maritime States. The recent volume by Hackworth on American practice and on the League of Nations Codification Conference of 1930, support the latter view. But these are minor points in Tomasevich's very illuminating volume, although of particular interest to readers of this JOURNAL, and it is indeed unfortunate that the author went out on a limb by making these statements in view of his admission that "The extent of territorial waters, even if it were politically possible, would not solve the problem of the protection of fisheries in general." Again the issues of fisheries protection have been confused by rather extraneous considerations of the three-mile limit!

Aside from these, and other minor references to legal and international relations problems, the book is a sound analysis of three of the principal fisheries agreements to which the United States is a party. Part I deals with the introductory matters of "Fisheries Research: Organization and Problems" (pp. 8-19), "Fisheries and International Law" (pp. 20-36), and "The Problem of Conservation" (pp. 37-48). Part II is devoted to a consideration of the protection of Fur-Seal (pp. 65-125); Part III, the Pacific Halibut conventions (pp. 125-218); Part IV, the Fraser River Sockeye Salmon (pp. 219-268). An Appendix considers "International Conventions Regarding Conservation of Fisheries in European Waters," "Whaling," and the "Great Lakes Fisheries."

The three principal parts of the volume, those dealing with the fur-seal, the halibut, and the sockeye salmon, present an adequate historical discussion of the conditions which gave rise to the need for international action to achieve protection, the problems which were encountered in securing an

agreement, the negotiations, and an analysis of the convention which resulted therefrom.

In the sections on the fur-seal, Tomasevich presents an enlightening discussion of the Alaska sealskin trade which is not generally available except in government publications. The abrogation of the Fur-Seal Convention of 1911 by Japan prior to that country's attack on the United States, has focused a good deal of attention on the fur-seal conservation policy and probably will be one of the early subjects of postwar negotiation on marine resources. It is unfortunate that more attention was not devoted to the Japanese allegations of the inadequacy of the agreement, for it must be admitted that the failure to provide for frequent scientific analysis of the fur-seal life-cycle and migrations was one of its weaknesses. The convention did achieve the protection and rehabilitation of the herds, as Tomasevich points out, but this must be measured in terms of the economic utility of the fur-seal, and in this there are serious doubts, at least in terms of the costs of protection and its probable destruction of other sea products. The author's statement that "nothing but praise can be said of it" cannot be accepted until a more thorough and modern analysis of the scientific aspects of the fur-seal herds is considered than those apparently used by the author.

The most interesting sections probably are those dealing with the "cartel" established by the halibut industry to allocate quotas among the various participants in the fishery in view of the general quota placed upon the halibut catch by the American-Canadian halibut agreement. The cartel's principal concern, however, was the "stabilization of prices" and not the protection of the fishery. The discussion of the sockeye salmon fishery is the most thorough which has appeared in print, particularly those sections dealing with the depletion of the fishery.

The brief notes in the Appendix help to justify the broad title of the book, which in reality is an analysis of the three agreements, the fur-seal, halibut, and sockeye salmon. The convention of 1882 was not the first of its kind, however, as the author states on page 270, since it is closely modeled after the English-French Channel Fishery Conventions of 1839 and 1867.

In order for international legislation for marine resources to be effective, it must be based on a thorough knowledge of the scientific and economic aspects of the sea product to be the object of legislation. Tomasevich has not only emphasized this, but has made a real contribution in his presentation of the economic undercurrent to fishery protection.

L. LARRY LEONARD

Regimen Jurídico de las Obligaciones Monetarias Internacionales. By Alberto D. Schoo. Buenos Aires: Editorial Guillermo Kraft Ltda.; New York: J. B. Powers, Inc., 1940. pp. xvi, 1000. Indices. Paper, \$7.50; cloth, \$9.00.

Dr. Schoo's voluminous book is a survey of the law of international financial obligations. These comprise, according to the author (p. 58),

all obligations involving the transfer of money, or, more generally, of values from one country to another. Chapter I—The International Financial Obligation and International Payments, is devoted to the definition and classification of international financial obligations and of international payments. Distinctions are drawn between debts governed by international and by domestic law and between debts of public bodies and of private individuals. The mechanics of international payments and of transfers of currency are briefly examined. Chapter II—Monetary Obligations and Public International Law, examines various classes of international agreements on financial matters; for instance, agreements for the transfer of public debts in case of state succession and for the financial reconstruction of certain States. Chapter III—States' Interference with International Investments, analyzes the different legal methods adopted by the States to control investments by their nationals abroad and the issuance of foreign loans in the domestic market. Chapter IV—Foreign Loans, is devoted to public debts. The author examines their legal nature, the various guarantees devised to secure payment, various cases of non-performance and their effects, the jurisdictional problems arising from attempts at obtaining repayment, the influence of territorial changes on public debts, and foreign interventions to protect creditors. Chapter V—The Money of Payment, deals with foreign currency debts from the viewpoint of private law and considers especially the problems arising from devaluation, revaluation and other alterations in the rate of exchange. In Chapter VI—Conflict of Laws, the author examines the problems connected with the choice of the law governing international payments and the problems of private international law arising from the fluctuations of currency. Chapter VII—Exchange Control and Clearing Agreements, deals especially with the extraterritorial effects of exchange controls and with the influence of clearing treaties on private financial transactions. The final section of this chapter considers penal provisions in currency matters.

While each of the topics examined in the book has already been the subject of considerable research, no attempt has been made as yet at a general and comprehensive outline of the law governing international payments. Dr. Schoo's book deserves credit as the first attempt of this sort. The book bears witness to the author's thorough knowledge of the subject considered and of its economic background. All the pertinent literature and the relevant decisions of national and international courts have been examined. Of course the book has some inevitable defects of pioneer works. Some of the premises seem to be doubtful. The author does not distinguish with sufficient precision between international debts and debts in foreign currency. A foreign currency debt is not necessarily an international monetary debt. The order of the treatment seems also open to question. Some overlapping may be noticed. For instance, the protection of foreign investors is considered at page 156 ff., and then again in greater detail at

page 485 ff. Because of the lack of unity, the book is a collection of monographs on selected problems on the law of international debts rather than a systematic survey of the whole subject. Important problems, such as the determination of the rate of interest on international debts and the liquidation of damages in case of non-performance, are not adequately dealt with.

In view of the broad field covered, the author has been unable to give to some subjects (as, for instance, the effects of state succession on public debts and the influence of the fluctuations of currency in international payments) the attention which they have received from earlier authors such as Feilchenfeld, Sack and Nussbaum. On the other hand, some parts of the work show little originality. For instance, in the last chapter on clearings, the author relies very heavily on and adds nothing to Dr. Lemkin's excellent book *La réglementation des paiements internationaux. Traité de droit comparé sur les devises, le clearing et les accords de paiement*, Paris, 1939, reviewed in this JOURNAL, Vol. 36 (1942), pp. 527-528. Notwithstanding these defects, Dr. Schöo's book is a useful and timely contribution to the study of the international aspects of the law of money.

ANGELO PIERO SERENI

World Minerals and World Peace. By C. K. Leith, J. W. Furness and Cleona Lewis. Washington: The Brookings Institution, 1943. pp. xiii, 253. \$2.50.

This most recent study of world minerals will be read with interest by all who are concerned with the subject, particularly as it relates to the war and the problems of the peace. The distinction of the authors alone would make the appearance of the book a notable event. The study is divided into three broad fields of inquiry. Part I deals with the physical and commercial trends of the minerals industry, which includes not only a brief history of the production and consumption of the principal minerals up to World War II, but also summarizes in graphic fashion through the use of trade maps the interdependence of nations upon key mineral resources. In Part II, which deals with recent trends in political and economic controls of mineral supplies, a brief but interesting summary is given on the development of monopolies and cartels with the respect to certain key products. In addition, a review of the commercial policies of raw material producing and consuming nations is presented as an introduction to the final chapter of Part II, which describes the efforts of the seven major Powers to gain a position of self-sufficiency.

Part III of the study is devoted largely to broad conclusions concerning the future of minerals with respect to the problems of the peace. As the authors state, "the facts show conclusively that, *except in times of war*, neither the Axis Powers nor any other nation has been unable to procure great quantities of essential raw materials in world markets. . . . The

loudest complaints on this score have come from nations which were preparing for war and found it impossible to muster sufficient exchange to pay for the abnormal quantities of imported mineral resources which their war program necessitated." With respect to the problem of mineral sanctions as a means of preventing future aggression, the authors conclude "that any mineral control plan that is to be effective involves the use of force." Such mineral controls, moreover, as might be adopted as a means of preventing the rearmament of future aggressors, "could only be treated as an integral part of a broader program for the prevention of future wars." It is too bad that the authors did not have available for their use better statistical evidence as to the stock piling of nations for purposes of war previous to 1939, as well as statistics on mineral output in the warring nations since 1940.

BROOKS EMENY

The Latin American Policy of the United States: An Historical Interpretation.

By Samuel Flaggs Bemis. New York: Harcourt, Brace and Co., 1943. pp. xvi, 470. Maps, diagrams, index. \$4.50.

This historical interpretation of the Latin American policy of the United States is a fascinating and exciting book, a worthy addition to the publications of The Yale Institute of International Studies. That it is an interpretation, Professor Bemis avows; and, as an interpretation, his glorification of national policy becomes amusing rather than a serious blemish: in 1783 the villains Britain and Spain "in sinister symmetry" encircle the feeble republic (p. 17); Florida in the hands of Spain is a pistol levelled at Louisiana (p. 22); "it would be difficult to find in modern history any such successful diplomacy of peaceful nation-building" as that of John Quincy Adams in carrying "his country's flag permanently over the mountains to the Pacific Ocean, from sea to shining sea" (p. 38). Mr. Bemis deplores "those historical philosophers who deprecate the Manifest Destiny of an agrarian continental expansion . . . the strongest and most enduring expression of American nationalism" (p. 74). "Sober reflections" on the Mexican War suggest to him that Mexico's anarchy and folly were as responsible as American expansionism for the war, and that Polk "correctly interpreted and achieved the Manifest Destiny of his country" (p. 92). Olney's "20-inch gun," which has been deplored by "anaemic academic folk and timid intellectuals," was part of "the most significant exposition of the [Monroe] Doctrine since its original pronouncement" (p. 120); the taking of the Canal Zone was "the one really black mark" in our Latin American policy (p. 151); "dollar diplomacy," although not without some disagreeable features, was not as bad as it sounds—in any case it was "essentially non-imperialistic" (this might depend upon how narrowly imperialism is defined) and our "comparatively mild imperialism" was really "an imperialism against imperialism" (p. 386). Our interventions in Haiti, Santo Domingo, and elsewhere in the Caribbean, are not entirely approved by Professor

Bemis, but in his accounts the United States gets off rather lightly. Enough has been indicated to show that, whether consciously or not, our author carries on the tradition of "patriotic history."

The merits of the book are substantial, and the story is told with a grand sweep and much newly unearthed documentary material from 1776 to 1943. Particularly interesting to international lawyers are the chapters on "The Doctrine of Nonintervention and the Codification of American International Law," "The Rio Commission of Jurists and the Havana Pan American Conference," "The Good Neighbor at Montevideo," and "The Triumph of Absolute Nonintervention." The importance of these subjects in the evolution of our Pan American policy has never been so adequately appraised, nor have current developments been so competently analyzed in the perspective of our Latin American policy. If, at times, one gains the impression that Professor Bemis has too much relied on documentary analysis to give a well-rounded picture of the impact of our policy, it can nevertheless be said that this part of the task has never been more ably performed.

HERBERT W. BRIGGS

The Nazi State. By William Ebenstein. New York: Farrar & Rinehart, 1943. pp. xi, 355. Index. College ed., \$2.00; trade ed., \$2.75.

National Socialism. Basic principles, their application by the Nazi Party's foreign organization, and the use of Germans abroad for Nazi Aims. Department of State. Prepared by Raymond E. Murphy, Francis B. Stevens, Howard Trivers, Joseph M. Roland. Washington: Government Printing Office, 1943. pp. vi, 510. Index. \$1.00.

The scholar who deserves that name can only have one legitimate interest, the interest in truth. It is his task objectively to explain, a task particularly important in war times. And yet, war threatens the scholar's research for truth in many ways: inaccessibility of materials, prejudice, war psychosis. These dangers Ebenstein has avoided in his book. This book, written as a text-book for college students in comparative government, deals with the structure of the present German national, state and local governments, the organization of the party, and the totalitarian *Gleichschaltung* in all fields—law, justice, press, radio, art, literature, religion, education, economics and labor. His presentation fully covers the subject, is correct and—a great advantage from a scholarly point of view—exclusively based on authentic German National Socialist sources. The chapter on National Socialist foreign policy seems to this reviewer to be somewhat meager.

But Ebenstein has not wholly avoided a second danger threatening the scholar's research for truth, namely, the danger of reinterpreting earlier history in the sense that it led of necessity to present National Socialism, the danger of an indoctrination *à rebours* against everything German. It is not possible within the framework of this review to develop these ideas. Be it said only that the problem of Germany is much more complicated than

one can understand from a study in white and black. Nationalism and imperialism are not exclusive German monopolies, and on the other hand, German thinking is manifold. As an American professor has put it in a recent article: Whether future international relations will be on a communistic, nationalistic or truly international basis, under any hypothesis, they will go back to the ideas of a German thinker: Marx, Hegel, Kant.

The publication of the Department of State is a treatise on a specialized subject, prepared by experts of the Department, based exclusively on National Socialist sources and extremely well documented. The first, general part, develops the elements of National Socialist ideology. A few remarks on earlier Germans quoted in this part, seem necessary. E. M. Arndt and Th. Körner were patriots, poets inspiring the fight against the tyrant of that day, Napoleon; Körner gave his life as an officer in the War of Liberation. J. G. Herder was not a "political writer" at all. This great poet and thinker was the outspoken foe of all militarism, absolutism and imperialism; to this apostle of *Humanität*, the great translator of the Spanish epic of the *Cid*, nothing was more foreign than any claim to German superiority. To Herder we may trace back the principle of "national self-determination," but certainly not the doctrine of "Nordic supremacy."

Part II is a detailed juridical study on German citizenship laws and on National Socialist policy, concerning dual nationality, expatriation and naturalization of Germans in other countries.

Part III gives a detailed survey of National Socialist organizations working among Germans in foreign countries: the "Foreign Section of the Reich's Directorate of the NSDAP" and the two formerly private organizations of the VDA and DAT, on the use of organized German minorities and on the present policy of forming corporate German minorities in conquered Europe. German words which cannot be adequately translated into English are retained in German and explained in a glossary of German terms.

The text is followed by 48 documents and charts, covering about 350 pages. This documentary section is of particular importance, all the more so as many documents are also given in the German original, and all the German originals are reproduced photographically. JOSEF L. KUNZ

The German Strategy of World Conquest. By Derwent Whittlesey. New York, Toronto: Farrar & Rinehart, 1942. pp. xiii, 293. Index. College ed., \$1.90; trade ed., \$2.50.

The World of General Haushofer. By Andreas Dorfalen. New York: Farrar & Rinehart, 1942. pp. xxi, 337. Index. College ed., \$2.75; trade ed., \$3.50.

Generals and Geographers: The Twilight of Geopolitics. By Hans W. Weigert. New York: Oxford University Press, 1942. pp. xi, 273. Index. \$3.00.

It is clear that the close of the war will bring with it problems of reconstruction which will extend far beyond the traditional fields of international law. No mere mechanism of international government will be adequate to

create the spirit of good will essential to effective coöperation. It will be necessary for governments to study more carefully than they have done in the past the causes of international conflict and to seek to eliminate them by constructive measures. Among these causes are ideas which, no less than economic conditions, give rise to psychopathic states of mind that lead to methods of violence. The international law of the future must of necessity be concerned with the factors of national conduct by which the foreign policy of the particular State will inevitably be influenced.

It is for this reason that students of international law will find the theory of "geopolitics," as set forth in these volumes, to have an important, if indirect, bearing upon their work, although the authors are concerned not so much with the re-education of Germany after the war as with the danger which the present German mentality holds for the world. Professor Whittlesey undertook the present study at the request of the National Planning Association, and, with the aid of an Advisory Committee and the special collaboration of Professors Colby and Hartshorne, gives us "an objective analysis of the writings and doctrines of the geopoliticians." His purpose is to evaluate geopolitics in the light of democratic thought and to set forth the part it has played both in the intellectual background of Nazi Germany and in its actual plans of world conquest.

Part I of the volume deals with the antecedents of German national and racial supremacy, with the emergence of the geopoliticians and their philosophy and methods. "Political geography is a science of space. . . . Geopolitics considers how the state overcomes the conditions and laws of space and makes them serve its purposes," quote the authors from one of the disciples of Haushofer, who is said to write more clearly than his master. Part II deals with the application of geopolitics to the situation of Germany as a Central European State, and to the practical means by which German geopoliticians believed it might be possible to put into effect their theories. Part III, dealing with the implications of geopolitics for the United States, shows the need of a better understanding by the American people of the "earth-base of human society" and of an international organization which can substitute coöperation in place of the system of power politics which, if allowed to run amuck after the war, will result in economic competition and war upon a far greater scale than the world has yet endured. An elaborate bibliography is appended, the titles of which are keyed to the documentary material incorporated in the text. The maps are of great value in showing the technique of propaganda carried on by the geopoliticians.

Mr. Dorfalen's volume follows more or less the same lines, seeking "to reduce to simple terms the mysteries which have been prowling under the name of Geopolitik." The story of General Haushofer is interestingly told, and the author wisely presents the documentary material as separate appendices to the several chapters. There is an excellent critique of the "heartland" theory in the chapter dealing with "Geopolitik and World

Politics." In a concluding chapter the author shows how Haushofer taught the German people to "think in continents"; but that in the present war things failed to go according to plan not only because Hitler himself disregarded geopolitics in his attack upon Russia, but because Haushofer's own theories failed to take into account the reaction of Great Britain and the United States to Germany's plans of conquest, and his naïve belief that the United States could be bought off for the price of commercial concessions.

Dr. Weigert, a former member of the Prussian Ministries of Justice and Foreign Affairs, now Professor of International Relations at Trinity College, brings to his subject not only the information of one who understands the German official attitude, but the conviction of a German Liberal that the people of the United States must realize the need of changing their restricted outlook upon international affairs "to a truly global world view." He is not content merely to analyze theories; he wants to draw conclusions; he sees in certain named American writers a geopolitical attitude which "does not differ at all from the philosophy of Haushofer's Prussian militarism." Instead of Haushofer's geopolitics, the American people must learn "the lessons of humanized geopolitics," based upon the uniting bond of the democratic idea and taking into account moral, social and economic forces as well as military considerations. For the first time in history, says the author, "the whole world is a closed political unit in international politics," and the United Nations, if the war is won, must be a closed unit too. The reader will be somewhat puzzled, however, to read a few pages later that in this closed political unit the Powers dominating the land masses, the United States, Canada, Russia and China are to govern the world. But fortunately in these continental land masses "the intangibles," justice, freedom and democracy, are more at work, and it is here, we are assured, "that Democracy will become a world cause as global as the global Imperialism of the totalitarian Powers."

C. G. FENWICK

BRIEFER NOTICES

Prisoners of War. A Study in the Development of International Law. By William E. S. Flory. (Washington: American Council on Public Affairs, 1942. pp. 179. Index. Cloth, \$3.25; paper, \$2.75.) The purpose of this timely monograph is to review the development of the conventional and customary law relating to prisoners of war, with special reference to American and British policy and practice. A brief historical review of the treatment of war prisoners in the ancient, medieval and modern world is followed by a discussion of the categories of prisoners, their status and maintenance, their release by consent or otherwise, and finally the progress applied to their treatment both by customary law and convention. Unfortunately, the actual treatment accorded to prisoners of war is very different from the expressed governmental policies and rules. Especially is this true of the inhabitants of conquered or occupied territories which should have a status at least as favorable as combatant prisoners. The author does not assume to deal with this grim phase of the subject, although he refers

to it. His object has been to present the growth of the law, if it can be so called, not its application. The author recognizes that in order to ascertain the actual treatment which prisoners of war receive, there must be some method of investigation and determination of the facts through neutral States and, above all, through neutral organizations like the International Committee of the Red Cross. The basis for such activities and some of the results achieved represent a more hopeful phase. Perhaps no real progress can be expected until some means for the trial and punishment of violators of the rules and conventions have been devised. The presentation is scholarly and well documented throughout.

ARTHUR K. KUHN

International Law and Totalitarian Lawlessness. By Georg Schwarzenberger. (London: Jonathan Cape, 1943. pp. 168. Index. 10s. 6d.) It is small wonder that in the face of so many flagrant violations of treaties and well established principles, the world is becoming increasingly sceptical as to the efficiency and even the existence of international law. In the circumstances, it is encouraging to find in the most recent study by Mr. Schwarzenberger a forceful refutation of the defeatistic attitude towards international law. The book is limited to the task of establishing three points: first, the compatibility of assistance against the aggressor with the rights and duties of neutral States; second, the punishment of war crimes; and third, the significance of outlawry as a weapon against peace disturbing nations. An appendix, containing an English translation of case reports on the trials of war criminals before the German Supreme Court, of a Forced Labor Decree in the General Government of Poland, and of other interesting documents, adds to the value of the book. The author has approached the above mentioned problems with the analytical thoroughness of a very learned scholar, well acquainted with the Continental and Anglo-American legal literature and with the realistic mind of an experienced lawyer. Very rich source material is used in support of the author's arguments. The book is a valuable contribution to the rôle which international law has played during this war and should play in the future.

F. E. OPPENHEIMER

Pacific Charter: Our Destiny in Asia. By Hallet Abend. (Garden City, N. Y.: Doubleday, Doran & Co., 1943. pp. ix, 302. Map. \$2.50.) Hallet Abend has had a long and intimate acquaintance with the Far East. He has formed definite views and conclusions concerning "Our Destiny in Asia." His main conclusion is that the United States cannot possibly escape a major rôle in the postwar reconstruction of that vast region bordering on the Pacific. He feels that under the Atlantic Charter we must see to it that the dependent races of Asia be assured of ultimate freedom and self-government. Mr. Abend realizes, however, that neither the Philippines, Korea, China, Malaya nor the Dutch East Indies will be prepared for independence when this war is ended. He seriously doubts the capacity of the people of Thailand for self-government. Mr. Abend holds that Japan must be completely driven out of China, Korea, Formosa, and all territories which have been conquered. He is convinced that for the sake of international security, Japan must be reduced to a state of absolute impotency. His knowledge of Japanese leaders and his old friendship for the people of Japan lends special force to his views. The object of all law being the protection of interests, it is of the utmost importance that we should clearly define the interests which international law should protect. This book, therefore, is of immense value in clarifying the rôle of international law in the vast Asiatic area.

P. M. BROWN

The Reciprocal Trade Agreements Program: The Policy of the United States and its Effectiveness. By James Constantine Pearson. (Washington: Catholic University of America Press, 1942. pp. xiii, 328. Bibliography. Index. \$2.00.) In pursuit of the doctorate at the Catholic University of America, Dr. Pearson has achieved the unusual in the field of doctoral dissertations. The result is a book which is interesting, contemporary, and of much practical value. The author devotes an opening chapter to the evolution of trade policy, with special reference to the development of free trade. Beginning with the postwar period in 1918, the main outlines of international trade policy are traced through the early days of prosperity, the world economic depression, and the world trade trends immediately following the 1929 economic crisis. The substantive portion of the volume begins with Chapter III, wherein the author sets forth, defines and evaluates the objectives of the reciprocal trade agreement program. Chapter IV, dealing with means and method, includes sections on the standards and limitations established by the Trade Agreements Act; organization under the Act and its administration; the method of procedure; and the structural elements of the trade agreement. A final chapter is devoted to the effectiveness of the program. Here the author deals with its effectiveness "in principle"; with certain "manifestations" of its effectiveness; and with the effects of the trade agreement with Belgium. The "Conclusion" is in part summary, in part appraisal, in part defense, and in part prophecy. The limits of a brief review forbid discussion of details. The reviewer believes that the excellent material in this book might well have displaced much of the dull and hackneyed data presented in defense of the extension of the agreements recently before the Senate and House Committees. Like those officially defending the program, however, the author seems to make one serious mistake. The rather mild concessions under the reciprocal trade agreements do not begin to indicate the nature and extent of the concessions which the Great Powers, including the United States, must make in the near future, in the difficult task of recovering an impoverished world from the ravages of a totalitarian economy.

CHARLES E. MARTIN

The San Juan Archipelago. Study of the Joint Occupation of San Juan Island. By Hunter Miller. (Washington: July 4, 1942. pp. 203.) This monograph of 27 chapters and an appendix of correspondence, printed in a limited edition, was prepared as part of Volume VIII of *Treaties and Other International Acts of the United States*, a volume which has not yet been published. It is based upon a careful study of an expert investigator, who, after examination of the original materials of the Department of State and printed documents of Congress, made a personal study of San Juan Island and the immediate vicinity, and of important manuscript correspondence in the Provincial Archives of British Columbia which are rich in relevant material. It begins with the Oregon Treaty of 1846 and extends to the arbitration of 1872 under the Treaty of Washington of 1871, treating in detail the sources of controversy and conflict before occupation by Capt. George E. Pickett in 1859, the result of this occupation, the mission of Gen. Winfield Scott late in 1859, and the incidents of the period of limited joint military occupation from 1860 to 1872. It is a very thorough detailed study.

J. M. CALLAHAN

Political Handbook of the World, 1943. Edited by Walter H. Mallory. (New York: Harper & Bros., for the Council on Foreign Relations, 1943. pp. vii, 202. \$2.50.) In its sixteenth year, this invaluable annual main-

tains its high standard of excellence and supplies us with the accustomed factual information relative to the parliaments, parties, and press of the world's various political entities. This information is revised, as of January 1 of this year, to take account of many recent governmental transformations. Particular attention has been given to the governments of the countries which have been overrun by the Axis armies. The members of the cabinets of all the governments in exile are given, as well as the war cabinets of the belligerent Powers. Information is also supplied relative to the International Labor Organization, the League of Nations, the World Court, and the mandated territories. It is truly remarkable how much valuable information the editor has been able to present in this very condensed yet readable form.

ELLERY C. STOWELL

World in Trance. By Leopold Schwartzschild. (New York: L. B. Fischer Publishing Corp., 1942. pp. 445. Index. \$3.50.) The author of this survey of recent European diplomacy was formerly editor of *Das Tagebuch* in Germany but left with the advent of the Nazis. Although the subtitle declares that the period covered is from Versailles to Pearl Harbor, the emphasis is most decidedly upon the pre-Hitler era. For this period the author has not only used his own keen powers of observation, but he has utilized all of the primary and secondary historical sources to support his thesis that the present war is nothing more than a part of a Thirty Years' War begun by Germany in 1914 for the conquest of the world.

Mr. Schwartzschild is somewhat partial to the theories of Clemenceau and Tardieu to the effect that peace must depend in its last analysis upon a strong military coalition of the United States, Great Britain and France. Consequently, he is extremely critical of Wilson's utopian theories. His thesis is provocative of further consideration of the League's possibilities of maintaining peace but is not altogether convincing. Like a lawyer, he over-emphasizes the facts that fit his theories and leaves out the others. For example, in his discussion of the fall of the mark (p. 198) no mention is made of the Ruhr invasion as a cause, and twenty pages later a casual remark indicates that it was due to passive resistance and not as a result of the occupation. Even the Germany of Stresemann is regarded with jaundiced eyes. Locarno was "just another piece of paper . . . a meaningless pact." "Briand had hypnotized himself." Granted that the ultimate result was failure, certainly at the time there was a real desire for peace in Europe, and Germany did as much as France or Britain to achieve it. Even considering the over-emphasis upon *realpolitik*, the book is a brilliant presentation of the seamy side of postwar diplomacy and the futility of appeasement, and merits careful consideration by the statesmen who will face a somewhat similar problem at the end of the present war.

GRAHAM STUART

Wilson's Ideals. Edited by Saul K. Padover. (Washington: American Council on Public Affairs, 1942. pp. 151. Index. Cloth, \$2.50; paper, \$2.00.) This volume brings together under appropriate headings selections from the writings and public addresses of President Wilson. The selections are arranged in logical sequence, beginning with general principles, "America," "Democracy," and "Government," and proceeding to the application of these principles to "Business," "Labor," "Foreign Policy," "The League of Nations," "America's Responsibilities," and "Peace and War." The author finds Wilson's conception of democracy to be "a balance of mutual interests," in which freedom could be maintained only in a society "where

no single interest predominated over any other." His idea of a world "made safe for democracy," so ridiculed at the time, was not based upon illusions as to actual virtues of governments professing to be "democratic," but upon his firm belief that democracy was the form of government under which freedom and law could best develop in the United States, and upon his realization that democracy was essentially less warlike than authoritarian governments and less able to maintain itself in a world in which international lawlessness prevailed. The volume makes no attempt to explain the developments in Wilson's thought, such as the transition from the defense of America's neutral rights to the defense "of the rights of mankind"; it is merely what its title indicates, a convenient collection of Wilson's ideals, to be read by the more thoughtful student in the light of the circumstances under which they were put forth.

Plans for World Peace through Six Centuries. By Sylvester John Hemleben. (Chicago: University of Chicago Press, 1942. pp. xiv, 227. Index. \$2.50.) Professor Hemleben here surveys for us the historical background and development of the idea of an organization to secure permanent peace. The selection of the various plans put forward from time to time begins with the fourteenth century and ends with plans antedating the formation of the League of Nations. The first three chapters, dealing with "Early Peace Plans," "Projects to the Close of the Eighteenth Century," and "Plans of the Nineteenth Century," are a careful and scholarly study of the subject; and, in spite of retracing ground already covered by others, the author has presented his subject in a fresh light and has gathered together in footnotes numerous references that will be of value to the student. A bibliographical note in the Introduction and a more elaborate bibliography at the end of the volume add to its usefulness. The chapter dealing with "Programs of the Great War Period" is less satisfactory, in that the plans there dealt with are part of the background of the League of Nations which the author has deliberately stopped short of. The closing page of the chapter "Reflections" lays stress upon the necessity of moral foundations for the international relations of the future, with which there will be little disagreement in principle, however difficult it appears to be to reduce the "natural law" from an abstract conception to a concrete series of practical rules. C. G. FENWICK

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WILBUR S. FINCH

AN APPRECIATION OF JAMES BROWN SCOTT

By FREDERIC R. COUDERT

President of the American Society of International Law

In the history of the American Society of International Law since its beginning no one was more active or more enthusiastically represented its aims and its purposes than Doctor James Brown Scott, despite a life of very exceptional activity in connection with almost every phase of international relations. Perhaps none of these other relationships, so faithfully and assiduously carried on, was as close to his heart as the success of our Society and of its Journal, of which he so long held the Editorship. As a Founder, as Secretary, as President through a decade, there was no activity of the Society that did not receive his full-hearted, enthusiastic support and leadership. For him international law was more than a study or a profession; it was, in fact, a religion.

Doctor Scott was a jurist, an historian, and a diplomat. In all of these roles he accomplished notable things. But above all, he was a moralist. To him international law was no mere collection of usages and customs, which industrious pedants had dug up and classified from the diplomatic, military and political annals of the modern nations.

Men's activities are conditioned by their fundamental beliefs; Doctor Scott loved the law because he believed it to be the instrument by which right and justice are done among men. With that faith in his heart he devoted his life enthusiastically, and without deviation to serve personal ambitions, to furthering the cause of the reign of law among the peoples of the world. To him it seemed possible that the nations might live in amity and that civilization might steadily and surely grow through the employment of reason and the application of legal principles founded upon the dictates of that moral faculty in men which alone makes a just and an orderly civilized society possible. It was his earnest conviction of the validity of individual effort that spurred him on to ever constant work for international peace.

Doctor Scott felt that the great sages of the past had pointed the way, and that, if man could but be made to practice the fundamental principles of right laid down by them, a progressive and a happy world was possible. One of his chief accomplishments was to put before the modern reader in current form the teachings of the great moralists of the past. He founded the Victoria Society and paid just tribute to that great thinker who, before the age of Columbus, had enunciated those principles upon which the law of nations was founded.

I had the good fortune, in connection with the meeting of the Institute of International Law at the Hague, to visit the tomb of Grotius at Delft. I

shall ever remember Doctor Scott's happiness in the placing of a wreath as a tribute from America upon the tomb of the "Father of International Law." His own conception of international law is admirably set forth in his Presidential address in French at the meeting of the Institute of International Law held in Cambridge, England. I translate a pregnant phrase from that address:

"The Odyssey teaches us that to live alone man must be a god or a beast, and Aristotle recognizes that man is a political animal, hence, the consequences—*ubi societas ibi jus*—who says society postulates law and proclaims the realities of international life. . . . This coexistence implies a higher law of the universal conscience, juridical and moral, under the control of intelligence and of human reason."

This fundamental conception dominated his work through life; to him its attainment was the supreme good. Hence, no movement for international betterment failed to stir his warm support. He was like that great leader, for whom he had such admiration, Elihu Root, a pioneer in the Good Neighbor Policy—a policy which has done so much for this continent and has proved its worth in these days of world-wide conflict.

I realize that this view of law has been belittled by the Nineteenth Century positivists as mere sentiment—vague, rhetorical and weak. However, the chaos of the last thirty years has led to a return to this older and more traditional view. This return is well expressed by Professor Ernest Barker of Cambridge University, historian and philosopher, as follows:

"A people does not make its law for itself by an exclusive act of autarchy in declaring what it will regard as law. It has and it needs a collaborator—the thought of its thinkers and the thinkers of other countries, a thought sustained and pursued through all the centuries about what is just and right in the relations of men. Only by such collaboration can natural law actually reign, or positive law deserve to reign." (Hibbert Journal, *Natural Law in Politics*, July 1938.)

Doubtless much will be written of the many activities of Doctor Scott and of his numerous writings on so many phases of public law and of history. But here I merely wish to speak of the man who, from the foundation of our Society, I had known and for whom as the years went by I grew to have so high an admiration and so warm a friendship.

Personality is ever a mystery; and one cannot adequately explain why some men so readily endear themselves to their fellowmen; but with Doctor Scott it can be said that he fully exemplified Terence's hero in that nothing human was alien to him. His wide reading had made him live in all the ages. He was a classicist, a lover of Latin, and was especially versed in the French civilization and language. The latter he spoke accurately and fluently, and he wrote an extended work on French as the language of diplomacy. Cicero was his favorite in the ancient world, and he never ceased to quarrel with Mommsen's view of that hero. A gentle scholar, loving justice and hating

violence and brutality, he greatly admired Erasmus who, in a time of European chaos, was able to preserve and to advocate restraint, moderation and the cultivation of scholarship. These characteristics of the inimitable sage of Rotterdam were dear to Doctor Scott. His was a friendly, humorous, kindly, nature. He had that understanding of which Madame de Stael speaks—he understood everything, and could pardon the errors and misunderstandings of man; but the irrationality of war was above all abhorrent to him, and tyranny and injustice ever hateful. In his own life he cherished the beautiful things of the mind and of the spirit—music, art, literature.

Doctor Scott possessed a genius for friendship, and felt I am sure at one with his old and admired friend, Cicero, who said in his delightful treatise on friendship, writing in a world where brutality was rampant, and shortly before his own head was chopped off by the butchers of Anthony:

“As for me, I can only urge you to prefer friendship to all human things, for nothing is so adapted to our nature, and in conformity with it, whether in good fortune or in adversity.”

Let us then ever remember the eager, courageous, unremitting efforts of Doctor Scott in the cause of international law; and let us keep green the memory of his delightful personality.

REMINISCENCES OF THE BERING SEA ARBITRATION

By WILLIAM WILLIAMS

Of Counsel for the United States

On February 29, 1892, a treaty was celebrated between the United States and Great Britain providing for the submission to arbitration of the issues which had arisen between those countries respecting the preservation of the valuable herd of fur seals of the Pribilof Islands in Bering Sea. These issues had come to a head in 1886 under President Cleveland, had remained very active throughout the whole of the succeeding administration of President Harrison and had lasted into the second administration of President Cleveland. During part of this period the feelings of the two governments ran high while the issues held the attention of the thinking public. Today, however, they have been largely forgotten and it would not have occurred to me to revive them during these stirring times had not my friend Mr. Frederic R. Coudert, who accompanied his distinguished father to Paris in 1893 as a youthful but very keen observer, requested that as the sole surviving member of the American delegation I review the salient features of this great effort to compose international controversies by reason rather than by a resort to arms. In complying with this request I shall at the same time seek to correct an impression held by many that the United States had a poor case, whereas in respect of one of the two principal issues, namely that of its ownership in the seals, it had a very good case, and in respect of the other, namely the regulations necessary for their preservation should ownership be denied by the tribunal, it had an unanswerable case on which it won what our opponents considered at the time to be a substantial victory though it turned out to be an inadequate one. The position of the United States on this second issue was fully vindicated several years after the arbitration.

ACQUISITION OF ALASKA AND SUBSEQUENT LEGISLATION

In 1867 Russia ceded to the United States "all the territory and dominion" then possessed by her "on the continent and in the adjacent islands." The western limit within which the "territory and dominion conveyed" were contained may be roughly described as a water line running southwesterly from Bering Strait so as to include in the cession all of the Aleutian Islands as well as the Pribilof Islands with their valuable fur seal industry. With the details of the eastern limit we need not concern ourselves here. A careful reading of this treaty shows that it did not purport to convey any non-territorial waters, the water line through Bering Sea serving only to delimit the territory on either side of it, and yet the early legislation enacted by Congress to protect the seals forbade their killing "within the limits of Alaska Territory *or in the waters thereof* (writer's italics)."

The indefinite expression "in the waters thereof" was to become the source of much confusion in determining the extent of the jurisdiction which the United States might claim over the waters of Bering Sea, for in 1872 the Treasury Department restricted its meaning to the usual territorial waters whereas in 1881 it interpreted it to include all the waters of Bering Sea lying east of the water boundary line referred to; with pelagic sealing on the increase it repeated this interpretation in 1886 under the Cleveland administration and sent out cutters to give it effect. In 1889 a futile attempt was made to obtain a legislative definition of this expression but Congress confined itself to declaring that section 1956 of the Revised Statutes included and applied to "all dominion of the United States in the waters of Bering Sea" and to directing the President annually to warn "all persons against entering said waters for the purpose of violating the provisions of said section," thus still leaving it to others to interpret these indefinite words.

Soon after the acquisition of Alaska in 1867 Congress enacted wise laws looking to the preservation of the fur seals by forbidding the killing of any female seal and providing as to males that none should be killed except on the islands where 100,000 young non-breeding seals were allowed to be taken annually by lessees under a twenty year lease which the Secretary of the Treasury was authorized to make with "proper and responsible parties." Violation of these laws was punishable by fine and imprisonment.

THE DIPLOMATIC CORRESPONDENCE

The issues which became the subject of this arbitration arose out of the threatened extinction of the seal herd of the Pribilof Islands through the killing of vast numbers of the females by pelagic sealers. They were precipitated in a dramatic manner, for in the summer of 1886 the Cleveland administration caused three sealing schooners flying the British flag to be seized in the open waters of Bering Sea, following which they were libeled and condemned by order of the District Court for Alaska at Sitka and their crews imprisoned. The British Government having made inquiry as to the grounds on which these seizures were based, Secretary of State Bayard merely referred it to the pertinent statutes and to the record of the judicial proceedings in the District Court where it was held that under the treaty of 1867 the United States acquired complete jurisdiction over the waters of Bering Sea east of the water line mentioned. Further seizures were made in 1887, but later all seized vessels were released for reasons that do not appear.

The ensuing diplomatic correspondence, extending over a period of some four years, has been so fully dealt with by others that I shall recall here only a few of its salient features, reminding the reader that it had to do with a novel and difficult subject, several aspects of which (as for instance our right of property in the seals) were not fully understood by our government at the time. Mr. Bayard evidently did not consider the decision of the district court a safe guide, for, putting aside for the time being all questions of right,

he wisely sought the coöperation of the British and other governments concerned in the protection of a useful and valuable species of animal from extermination through the indiscriminate, cruel and wasteful methods practiced by pelagic sealers. His approach to the subject met with initial success, for our Minister to Great Britain, Mr. Phelps, having presented to Lord Salisbury a note prepared by Mr. Bayard, was able to report that Lord Salisbury was willing to join in "any preventive measures it may be thought best to adopt. . . ." These negotiations, however, came to naught through objections raised by Canada. Commenting on this change of attitude by Great Britain, which was a source of great disappointment to our government and created bitter feelings which are reflected in some of the correspondence, Mr. Phelps wrote to Secretary Bayard:

Under these circumstances, the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives it does not appear to me there should be the slightest hesitation.

This was strong language. It was to be repeated later by Mr. Phelps both orally and in writing. He was a man of robust opinions whom I had first known as an able professor of international law at New Haven.

Mr. Blaine, having, on March 4, 1889, become Secretary of State under President Harrison, and having familiarized himself with the issues left unsettled by his predecessor, addressed to the British Government a spirited letter. In it he made the well known charge that pelagic sealing was *contra bonos mores*, to which Lord Salisbury took exception in the statement that it was not such from the point of view of international morality, and that, even if it were such, this would not justify seizing vessels on the high seas. Further to show that such seizures were illegal Lord Salisbury brought into the picture the ukase of 1821 under which he claimed that Russia had asserted territorial rights to the extent of 100 Italian miles over the waters adjacent to her coast lines, but that, following the protests of both the United States and Great Britain, she had withdrawn such assertions through the treaties of 1824 and 1825. The charge concerning the assertion of territorial rights over the high seas was readily answered by showing that Russia was merely seeking to prevent foreigners from exercising an illicit trade with the natives in her maritime possessions. There followed, however, a battle royal of some 30,000 words, ably conducted by the two distinguished disputants, dealing largely with the meaning of certain ambiguous geographical expressions used in these treaties, more particularly whether or not the terms Pacific Ocean, South Sea, and Great Ocean included Bering Sea, and the meaning of the term Northwest Coast of America. That Mr. Blaine, who was fond of controversy, realized that these lengthy arguments had but a remote bearing on the vital issues of the case would seem to follow from this statement made in the last of his formidable notes:

The repeated assertions that the Government of the United States demands that the Bering Sea be pronounced *mare clausum* are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Bering Sea for the protection of the fur seals.

The diplomatic arguments on both sides having now been exhausted, and it appearing that the Commissioners appointed by each government to make a joint study at the islands of the causes for the decrease of seal life were unable to agree on any material facts except that there had been a marked diminution in the number of seals, and that this had resulted from excessive killing by man, it was then realized that the only peaceful way of settling the differences would be through arbitration, and accordingly a treaty to this effect was entered into on February 29, 1892.

TREATY OF ARBITRATION, CASES AND COUNTERCASES

The Treaty of 1892 provided for the appointment of seven arbitrators, two by the United States, two by Great Britain, one by the President of France, one by the King of Italy, and one by the King of Sweden and Norway, all to be "jurists of distinguished reputation" and, if possible, to be acquainted with the English language. The points to be submitted for decision were embodied in five questions covering in substance (1) the assertion and exercise by Russia of any exclusive jurisdiction in Bering Sea or of exclusive rights in the seal fisheries therein, (2) any recognition by Great Britain of claims of jurisdiction as to the seal fisheries, (3) the question whether Bering Sea was included in the phrase "Pacific Ocean" in the treaty of 1825, (4) the question whether any rights exercised by Russia passed to the United States in 1867, and (5) what right of protection or property, if any, the United States had in the fur seals of the Pribilof Islands when found outside the ordinary three mile limit.

It was further provided that, if the determination of the foregoing points left the subject in such position that the concurrence of Great Britain was necessary to the establishment of regulations for the proper protection and preservation of the fur seals in question, the arbitrators were to determine what regulations outside the jurisdictional limits of either government were necessary. To aid them in that determination the report of a joint commission of experts dealing with seal life in Bering Sea and the measures necessary for its proper preservation and protection was to be laid before them. Soon after the treaty was signed Mr. Blaine retired as Secretary of State and Mr. John W. Foster succeeded him. Thus the execution of the treaty on the part of the United States fell into new hands.

Mr. James C. Carter, Mr. Edward J. Phelps, Mr. Frederic R. Coudert and Judge Henry M. Blodgett were appointed counsel by the President while Robert Lansing and the writer were appointed junior counsel by the new

Secretary of State. Under his supervision they assembled the material for and wrote the government's Case and Counter Case at the State Department during the busy summer and fall of 1892. It was indeed a pleasure to work under such a leader as Secretary Foster who was a man of action rather than words and brought to his high office a wide diplomatic experience, gained as Minister to Russia and to Mexico and in the private practice of international law. The preparatory work consisted largely of two parts, one dealing with the historical and jurisdictional questions and the other with the facts relating to the life and habits of the seals.

A careful study of the diplomatic correspondence by the "new hands" revealed that Mr. Blaine's brilliantly expressed contentions as to the measures adopted by Russia for the protection of her trade and industries on the coasts of Bering Sea lacked the support of specific instances showing actual exercise of control. Now it happened that the archives of the Russian American Company, which for years had, with the sanction of the Imperial Government, enjoyed all of the trading rights in these parts, were acquired by the United States at the time of the cession of 1867. They consisted of a large number of bound volumes of orders and general correspondence which had lain fallow all these years in the record room of the State Department and it occurred to Secretary Foster that they might contain evidence of value in support of Mr. Blaine's contentions. Competent Russian translators were scarce in Washington in those days, the Department having none, but one Ivan Petroff, who was thoroughly familiar with that language, was available and since in addition he had been for some time a government employee with a good record for reliability he was selected to read through these volumes and translate any document containing evidence of the character desired. In due course he produced translations of some thirty documents purporting to show instances, some of them striking ones, of what our government hoped it might be able to prove. This was very welcome news but it created no surprise at the time, because the result of Petroff's work was in accordance with expectations based on Mr. Blaine's notes to Lord Salisbury, and with this evidence it was possible to make a fairly good presentation of the position of the United States on the historical and jurisdictional issues. To enable the British Government to make its own translations it was furnished with facsimiles of the originals, and for reasons that will soon appear it is fortunate that this was done.

The exchange of the Cases took place in August and with the great pressure of work temporarily removed it occurred one evening to the writer, who had marked in his working copy of the Case the striking passages selected from the Petroff translations, to mark the corresponding passages on a facsimile set—this purely for his own personal satisfaction. He knew nothing of the Russian language, but having visited Russia the preceding summer on private law business he had come in contact with a number of Russian documents and their translations and had thus become familiar with many of the

Russian capital letters and a few of the small ones. Now most of the "striking passages" contained some such proper name as Kamchatka, Bering, Aleutian, or Okhotsk, and since the paragraphing in the facsimiles had been correctly followed in the translations it was not difficult to determine the approximate places where the passages in question in Russian were to be looked for in the facsimiles, the expectation being that thereafter with the aid of the capital letters such passages could be there definitely located. The writer attributed his failure to succeed in locating the first passage to his ineptitude and ignorance of the foreign language, but upon failing to identify the next two his suspicions were aroused and before the evening was over he became satisfied that a fraud of the first order had been practiced on the government.

The Secretary was absent in the West at the time of this unpleasant discovery but after telegraphic notice thereof returned at once to Washington. Upon being confronted with the evidence of his treachery Petroff broke down, signed a full confession of his guilt and was turned over to the proper authorities for prosecution. Unfortunately the Attorney General was obliged to report that there was no statute applicable to his case. Secretary Foster at once sent for Sir Julian Pauncefote, advised him of the government's embarrassment and assured him that correct translations would be substituted and our Case amended as soon as practicable. Through such amendment our position on the historical and jurisdictional questions was necessarily weakened.

Upon the exchange of the Cases it was discovered that the British Government had failed to include in its Case the facts in dispute in relation to seal life on which it intended to rely, and for such failure Secretary Foster at once took it to task in no uncertain language. After mentioning the "painful impression" created by this omission he wrote Mr. Herbert of the British Legation:

The President cannot conceal his astonishment that it should be assumed that the British Government is at liberty to introduce a whole body of testimony of this character for the first time in its Counter-case and thus shut out the United States from an opportunity of detecting and exposing any errors which may be contained in it.

In his reply Lord Rosebery, the then British Foreign Minister, after seeking to justify the action in question, yielded his position and submitted the report of the British Commissioners on seal life (of which more anon) as a part of his government's Case.

THE ALASKAN SEAL HERD

It is now time to acquaint the reader with the salient facts concerning this herd of remarkable animals. The fur seal (not to be confounded with the hair seal) is a warm blooded animal classified by naturalists with bears and other carnivorous animals and possessing a high degree of intelligence. It is in no sense a fish. To breathe when in the water it must come to the

surface. The young must be taught to swim and are not amphibious until several weeks old. All the members of this herd are conceived, born, and reared on land belonging to the United States, namely on one or the other of the two Pribilof Islands in Bering Sea known as St. Paul and St. George, and none ever visits any other land. These islands are in a sense their home during approximately five months of every year and whenever they leave them it is with the fixed intent of returning.

The seals may be roughly classed as bulls (over 6 or 7 years of age), bachelors (from 2 to 5 years of age), cows (breeding females), and pups. They are highly polygamous and the bulls arriving first surround themselves with "harems" often consisting of as many as 80 cows, fierce battles taking place for their possession. Almost immediately upon arrival at the islands in April or May from their winter migration, hereinafter referred to, the cows deliver their pups from the previous summer's breeding, no cow delivering more than one pup in any one year, so that the rate of increase is a slow one. Within a few days after landing the cows are again impregnated, the period of gestation being about eleven months. For about four months the pups rely exclusively on their mother's milk for food and to supply this milk the mothers soon after giving birth swim out into Bering Sea from 50 to 150 miles in search of food. Upon their return each mother searches out her own pup and will suckle none other. When the mother fails to return her pup dies. As a result of the polygamous character of the seals there are under normal conditions thousands of superfluous "bachelors" under six or seven years old which can be killed for their valuable skins without detriment, and probably with some benefit, to the herd as a whole. While on land they can be segregated and driven as easily as sheep, rendering it possible to exercise discrimination in the selection of those to be killed. Experience has shown that prior to the inroads made by pelagic sealing it was possible to kill 100,000 bachelor seals a year without affecting the stock.

During September and October the herd leaves the Pribilof Islands for its annual migration of several thousand miles through the northerly portion of the Pacific Ocean. Its precise course is not known nor do the groups always remain together but some seals begin to appear off the coast of California in January. Turning northward about this time the herd by a natural instinct travels up the coast some 30 or more miles from land and swimming through the eastern passes of the Aleutian Islands is back on the Pribilof Islands between April and May. The existence of these seals is dependent on the protection given them by the United States which has set apart the islands as a special reserve where they are guarded, at great expense to the government, against raids both through cutters at sea and watchmen on shore, while no disturbance of the breeding rookeries is permitted. In connection with this protection the government maintains on each island a colony of Aleuts to whom it has brought education and other features of civilization.

PELAGIC SEALING

The case against pelagic sealing is a very simple and at the same time a very cruel one. In view of the fact that these animals are highly polygamous, and their other peculiar characteristics, it follows as a matter of ordinary barnyard knowledge that any substantial killing of females endangers the stock. Yet (1) over 80% (probably 90%) of the pelagic catches consisted of females, and (2) virtually all so caught (a) were nursing mothers in search of food for pups which die if their mothers do not return or (b) were with young (gravid). The killing of one female thus usually results in the loss of two lives, without counting the pups which, but for such killing, would be engendered in future years. In addition at least one third of the seals killed or shot at sea sink and are lost before the carcasses can be recovered. Thus the pelagic catch of some 68,000 seals in 1891 meant the destruction of about this number of females, including those lost. And this impairment of the stock was accompanied by many cruelties and sickening sights in Bering Sea, including mixtures of blood and milk flooding the decks of vessels, and, in the North Pacific Ocean, by pups dropping from the sliced bellies of pregnant mothers, the pups in cases of advanced gestation being often alive and remaining so several days, when their skins would be removed for the fur.

It would seem that Mr. Blaine was right when he characterized this slow but sure extinction of a useful race of animals as *contra bonos mores*, and that when Lord Salisbury denied that it was such from the point of view of "international morality" he overlooked the fact that certain wrongful things are considered *mala in se*, without the necessity of awaiting an international judgment to make them such.

PROCEEDINGS BEFORE THE TRIBUNAL OF ARBITRATION

The seven members of the tribunal were the Baron de Courcel (named by France), the Marquis Visconti Venosta (named by Italy), Mr. Gregers Gram (named by Sweden and Norway), Justice John M. Harlan and Senator John T. Morgan (named by the United States), Lord Hannan and Sir John Thompson (named by Great Britain). Mr. John W. Foster was the agent for the United States. He had resigned as Secretary of State in February, Judge Walter Q. Gresham becoming his successor in March under the second Cleveland administration. Mr. Charles H. Tupper was the agent for Great Britain. Counsel for Great Britain were Sir Charles Russell, Attorney General of Great Britain, Sir Richard Webster, a former Attorney General of Great Britain, and Mr. Christopher Robinson of Toronto. It has already been stated that the leading counsel for the United States were Messrs. Carter, Phelps, Coudert, and Blodgett. This array of distinguished legal talent on both sides gave assurance that the proceedings would be of an interesting nature.

The French Government seemed pleased at Paris having been chosen as the scene of the arbitration and placed at our disposal the whole lower floor

of the beautiful building which houses the Ministry of Foreign Affairs on the Quai d'Orsay, at the rear of which is an extensive garden. In affording us this lavish treatment the authorities may have thought that they would be rid of us in a few weeks, but if so we disappointed them gravely for we stayed by them till August 15, in all nearly five months. The two delegations were, on arrival, late in March, invited by President Carnot to attend an official luncheon at the Elysée and a little later the Minister of Foreign Affairs, Monsieur Develle, tendered them a dinner in the lovely garden referred to. The tribunal met on March 23, 1893 and, after electing Baron de Courcel President, and receiving the printed arguments of both governments, it adjourned till April 4, on which day the oral proceedings began. It usually sat four days in each week from 11 till 4, with an immense amount of work to be done in the intervals by both arbitrators and counsel.

Mr. Carter opened the debate, addressing himself at once to the historical and jurisdictional questions and dealing with them largely along the lines developed by the State Department in the diplomatic correspondence. Thereafter he turned to the discussion of "rights which rest on fundamental principles," namely, those relating to a property interest in the seals and to the protection of the industry established on the Pribilof Islands. He argued that the law to be applied here was international law, the main foundation of which was the law of nature, a body of moral rules condoning nothing which was wrong; that "municipal and international law flow equally from the same source"; and that the rule of the tribunal should be the "general standard of justice recognized by the nations of the world."

He then engaged in a learned inquiry into the general foundations of property "in order to show that it was not founded on robbery or force or based on any arbitrary distinctions but that it was established for great social purposes," that the institution of property rested upon the necessity for establishing peace and order and for preserving and increasing the useful products of the earth, and that this required that "every useful thing, the supply of which is limited and which is capable of ownership, be assigned to some legal and determinate owner." He argued also (1) that under the law of nature all property was held in trust for the benefit of mankind and, (2) that, with certain important exceptions, only its usufruct was available for consumption. It is the view of the writer that Mr. Carter was unwise in choosing this tribunal as a forum for the discussion of the foregoing propositions because they had but a remote bearing on the issues, tended to divert the attention of the arbitrators from the latter, and furnished our clever opponents with several targets at which they did some successful shooting.

Coming to the case of the fur seals Mr. Carter stated that to determine whether they were the subject of property necessitated a study of their nature and habits, and, having recounted these along the lines hereinbefore set forth, and shown that though not fully domestic animals they yet possessed many attributes that brought them very close to the latter, he then discussed

the familiar instances in which both under municipal and international law useful wild animals such as a swarm of bees, wild pigeons, wild swans and geese and wild deer, reclaimed by man and possessed of the *animus revertendi*, may become the subject of property. Laying down the general proposition that where, by the art and industry of man or through their own instinct, useful wild animals are induced to return to a particular place so that the possessor of that place can exercise over them a power and control, deal with them as if they were domestic animals, and carry on with respect of them an industry or husbandry by taking their increase without impairing the stock, he argued that they are in law likened to domestic animals and are made property to the same extent as if they were domestic animals, such property continuing when they are away from man's custody, and no matter how far away, so long as they have the *animus revertendi*, the property in them ceasing only when the habit of returning ceases.

Mr. Carter further argued that while, in the case of the other animals mentioned, some sort of reclamation or occupation was usually necessary, as by the installation of hives, boxes, dovecotes or the like, yet the nature of the seals is such as to render anything of this sort inappropriate, the government doing far more by giving them the protection on which their very existence depends (by setting aside the Pribilof Islands as a national reserve where alone they can breed and rear their young and there guarding them at great expense through cruisers on the sea and watchmen on land against marauders who would otherwise have exterminated them long ago). He added that although their absence from the islands is very prolonged and the distances over which they travel very great yet their instinct to return is never absent and is "very far superior to any instinct that a deer may have to go to a particular place, or that of wild swans, or geese, or pigeons," since their very existence depends on this instinct.

Upon the foregoing facts Mr. Carter insisted that the United States had complete property in the seals not only while on its territory but elsewhere as well, that such property was continued during their absence through the certainty of their return, and that the novelty of their characteristics was wholly immaterial to the question in dispute and in no wise differentiated their case from that of other useful wild animals which under the authorities may be the subject of property. As to the distances covered in their migrations he pointed out that comparable distances were at times covered by carrier pigeons and bees.

In his argument in proof of our ownership of the seals Mr. Carter did not deem it necessary to stress our possession of these animals on the islands, because, as he said, he relied on proving "the development of the conception of *ownership* as distinguished from actual *possession*," adding that the "answer to the question why the law allows property to be owned by a man which he cannot actually possess must be found in some great social need. . . ." But since the words quoted might be construed as raising a doubt as to the

fact of possession on the islands, and since such fact was readily proved, it would seem that its assertion would have strengthened Mr. Carter's argument. A further reason why it should have been asserted lay in the necessity of meeting the charge stressed by our opponents in their printed argument that we had no such possession and consequently could have no title to the seals. Later on our possession was, as we shall see, fully established and made to serve as a basis for ownership.

Mr. Carter, and later Mr. Phelps, asserted the right of the United States apart from any question of ownership in the seals to protect its property interest in the industry conducted on the Pribilof Islands first by Russia and later by the United States against any wrongful invasion. In this connection they argued (1) that the doctrine of the freedom of the seas was the result of the gradual surrender by the great maritime nations of earlier exclusive claims in order that the ocean might be freely used by mankind for *innocent* purposes; (2) that in making such surrender the nations did not relinquish their right of self defense on the high seas either in times of war or peace, such right extending to such part of the seas as might be necessary and appropriate for the particular case, the three mile limit being merely an incident to such right and not the limit thereof, from which it followed that there were limits to the freedom of the seas; (3) that such right of self defense is entirely different from an assertion of sovereign jurisdiction and that, on the contrary, it asserts the freedom of the seas only for innocent purposes; (4) that where there is a peculiar natural advantage within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation and which would be destroyed if thrown open to the whole world, such particular nation may establish rules and regulations for its protection against the world; (5) that national industries requiring rules and regulations for their successful conduct, to be carried into effect by national authority, cannot be broken up by wrongful attacks made by individuals of another nation; (6) that where a fishery instead of being a mere pursuit in the open sea is attached to a territory and becomes appurtenant to it and is there made the foundation of a husbandry such fishery may become an object of self defense by the owner of the territory; (7) that within territorial limits enactments for the protection of national interests are binding as statutes whether reasonable or not, but beyond such limits they have the effect of defensive regulations, to be enforced at the discretion of the executive branch of the government, and that when reasonable their propriety has always been recognized by other nations.¹

Our counsel thereupon cited in support of these propositions a number of authorities, including the case of *Church v. Hubbard*, 2 Cranch 187, in which Chief Justice Marshall, speaking for a unanimous court, held that the right of a nation to seize vessels attempting an illicit trade is not confined to the

¹ A reference to the doctrine of self-defense in its relation to the Declaration of Panama will be found in the American Bar Association Journal for June, 1941, at p. 342.

range of their batteries, that "it has the right to use the means necessary for its prevention," and that "these means do not appear to be limited within any certain marked boundaries." This doctrine was cited with approval by the Lord Chief Justice of England in the *Keyn* case, 2 Law Rep. 214, where, in speaking of legislation relating to neutral rights and the prevention of breaches of the revenue and fishing laws, he said that "such legislation is altogether irrespective of the three mile distance, being founded on a totally different principle, viz. the right of the state to take all necessary measures for the protection of its territory and rights. . . . This principle was well explained by Marshall, C. J., in the case of *Church v. Hubbard*." The *Caroline* case which was also cited illustrates how far the principle of self defense may extend in an emergency. The Canadian Government having in time of peace sent an armed force into American territory there to seize and destroy an American vessel taken in charge by a number of persons in sympathy with a rebellion in Canada, succeeded in its purpose, and its drastic action was held justifiable under international law on the ground of self defense by Secretary of State Daniel Webster. The captain of this expedition, in the course of which a man was killed on American soil, having been arrested and brought to trial in a United States Circuit Court, was acquitted on the ground that he was acting under orders of his government which in turn claimed to be acting under a national necessity; and Mr. Phelps so argued.

Our counsel further cited numerous instances of legislation and regulations enacted by foreign countries to take effect beyond the limits of the usual territorial jurisdiction, such as hovering and quarantine laws, and also legislation to protect maritime industries appurtenant to a territory such as pearl oyster beds, coral beds, and fisheries. They justified all such enactments where reasonable on grounds hereinbefore indicated, claiming that they served as illustrations of the doctrine of self defense and that they were always respected by other nations. Notable examples were the protective measures concerning the Ceylon pearl fisheries extending over fifteen miles from the shore, the Scotch herring fisheries and the New Zealand fisheries covering a very extensive area of non-territorial water and subject to further discussion in connection with the answer of Sir Charles Russell. Our counsel pointed out that the right of protection in such instances is effected by force exerted not through legislative but through executive power.

Mr. Carter discussed also the disastrous effects of pelagic sealing through the slaughter of females either heavy with young or nursing newly born pups, a subject more fully dealt with in the succeeding argument by Mr. Coudert; he declared that no regulations would be adequate which failed to prohibit all pelagic sealing except that conducted by Indians in canoes and with spears as a means of livelihood.

During the next three sessions the facts in regard to seal life and the effects of pelagic sealing thereon were presented to the tribunal by Mr. Coudert

who also analyzed the pertinent British contentions. Their chief evidence consisted of the report of their two Commissioners supposedly chosen as scientific experts to study the subject in conjunction with other experts and to report their findings impartially "without reference to the interests of any body." Upon their appointment Mr. Blaine had found it necessary to make complaint to the British Government that "one of the gentlemen . . . has fully committed himself in advance on all questions which are to be submitted to him for investigation and decision" and that the other had "previous to his selection made public his views on the subject and announced to his parliamentary constituents that the investigation of this Commission and the proposed arbitration would be in favor of his government." Thus these British "expert" Commissioners became at once and remained throughout partisans and champions of pelagic sealing, sacrificing the principles of science to political expediency. One of their extraordinary propositions is referred to later.

Mr. Coudert pointed out that "a law suit has generally something desired by one side and objected to by the other" but that here both sides professed to want the same thing, namely the protection and preservation of the seals, and that the treaty was executed to this specific end. He added that if there were pleadings to guide counsel and court "we might bring down all the points and facts to a few questions", but that here we were put to the necessity of going over the whole case. He was right. With the common knowledge that the effect of excessive killing of females in a polygamous species of the type of the seals here involved is destructive of the stock it should have been possible to dispose of the effect of pelagic sealing on the herd in short order, for the British evidence conceded three deadly facts: (1) that in pelagic sealing the killing was indiscriminate with at least 50% of the catches consisting of females, (2) that in addition at least a certain percentage of the animals shot were lost, (3) that the killing of gravid females must be "deprecated as specifically injurious." Mr. Coudert thereupon remarked that if this were an ordinary judge and jury case he would stop at this point and insist that on the conceded facts the preservation of the herd and pelagic sealing could not co-exist.

But this was not such a case, and, moreover, the "protection and preservation" of the herd was not in fact the sole object of our opponents. While conceding that theoretically the methods employed by the United States of killing superfluous males on the islands "were exceedingly proper and were conceived to insure a large continual annual output of skins," yet our opponents, through their Commissioners, claimed that this was "*under the supposition that the lessees could have no competitors in the North Pacific* (writer's italics)." Thus was introduced a subject entirely foreign to the provisions of the treaty, and this very competition had, moreover, been active for some three years in reducing the herd to an alarming degree—all for reasons supplied by the evidence of our opponents.

Although it would thus seem that the United States was not called upon to offer further proof in the premises, yet it was deemed advisable to do so. First and foremost in this connection should be mentioned the splendid report of the American Commissioners, Thomas C. Mendenhall and C. Hart Merriam, both of them noted naturalists whose authority and reputation were not open to question. Their report sustained our position in every particular. Mr. Coudert, after referring to it, proceeded to marshal the relevant American evidence which had been collected with great care, largely in the form of sworn statements of numerous witnesses. These included dealers in fur seal skins in three countries, persons of standing in the maritime and scientific world, numerous sealers with first-hand knowledge of the matter, 29 of them hailing from "enemy country," namely Victoria; the evidence included also the statements of distinguished scientists from a variety of countries. Our opponents were in each case afforded the opportunity of cross examination. This great volume of evidence showed beyond question that from 70% to 95% of the pelagic catches were composed of females which, in Bering Sea, were nursing mothers whose newborn pups were awaiting their return, and in the Pacific Ocean females gravid with young. It was impossible for our opponents to meet this overwhelming evidence, though they sought to do so in their Counter Case, through the testimony of 122 men engaged in the business of pelagic sealing, but the great weight of even this testimony (which, incidentally, we had been deprived of the opportunity to dispute) was favorable to our contention. It having been shown that from 15% to 40% of the seals shot at with the breech loading shotgun, loaded with scattering buckshot, sank or escaped wounded, we note in passing that our opponents described this method of killing as "hunting . . . in which the animal has what may be described as a fair sporting chance for its life." As to this Mr. Coudert remarked, "I could not do justice to that by any comment and I leave it to the tribunal without criticism." In further illustration of the shocking cruelties which were the inevitable concomitant of pelagic sealing, and so barbarous that they would be indictable in any country with laws against cruelty to useful animals, the following amongst numerous other instances are cited without comment:

Niels Bonde, a Victoria sealer:

The seals caught along the coast after the first of April were mostly pregnant females and those caught in Bering Sea were females that had given birth to their young. I often noticed the milk flowing out of their breasts when being skinned. . . . I have seen live pups cut out of their mothers and live around on the decks for a week.

Thomas Brown, a Victoria sealer:

Most all the seals that we shot and secured were females and had young pups in them and we would sometimes skin them.

Mr. McManus, a British subject and a well vouched for Victoria journalist, who spent nine days in Bering Sea in 1891:

Aug. 25: First boat, two seals reported, wounded and lost five. . . . The snow white milk running down blood stained deck was a sickening sight. Aug. 26: Total 11 seals, 8 cows in milk. Skipper reported having wounded and lost . . . 16 in all. Aug. 29: Total catch 17 seals, greater proportion cows in milk; horrid sight, could not stay the ordeal out. A large number reported as wounded and lost.

The record shows that our opponents shed many tears over the lot of the gravid females which had the misfortune of being shot in the North Pacific with their unborn pups but that they had no word of sympathy for the nursing mothers shot in Bering Sea leaving pups to starve on the islands. This unfair discrimination may be due to the fact that the death of the starving pups was far less sensational than the destruction of those cut out from their mothers' carcasses amidst scenes of blood on the decks of schooners; and yet the net cruel and destructive result was about the same in the two cases.

The next argument was that of Sir Charles Russell who addressed the tribunal on behalf of Great Britain for eleven days. A man of great distinction at the bar, he was of a forceful and aggressive nature, with a rapid and incisive delivery which expressed his thoughts with great clarity. After commenting good-naturedly on Mr. Carter's "intellectual allurements" and "courageous ascents into the mists of metaphysics and ethics," he proceeded to argue with great ability and cogency the historical, the jurisdictional, and geographical points along the lines developed by Lord Salisbury in the diplomatic correspondence, of which enough has been said in an earlier section of this paper. He then dealt somewhat harshly with Mr. Carter's views on international law and its adaptability to new situations. I quote the following as illustrations:

(1) International law is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern their relations with one another . . . and so far only can there be said to be an incorporation of the rules of morality and of justice, as to which nations as well as men differ. In other words international law . . . rests upon the principle of consent. . . . If it were not so it would be in a constant state of flux and uncertainty.

(2) Nothing can be considered international law as to which it cannot be affirmatively shown that the consent of civilized nations has been given; and nothing short of an affirmative answer to the question *placuitne gentibus*, applied to any proposition, will satisfy the test of what international law is.

Our counsel pointed out that under the narrow rules thus laid down international law would be incapable of advancing and would terminate with the present; that they ignore the great influence of analogy as an instrument of the progress and development of the law as well as Lord Stowell's wise words that "so long as the continuity of the original principle is preserved . . . the practice is not new . . . when in fact the court does nothing more than apply old principles to new circumstances"; and that it is the business of courts of

justice to inform themselves of principles and to extend them to new cases where it is necessary. Under the rules cited the tribunal would, for instance, be forbidden to recognize as a principle of morality that gravid females of a useful race of animals should not be destroyed because "the civilized nations" had not held a convention on this subject and agreed to it. This, our counsel claimed, was not the road by which international law has advanced to its present position.

Before entering upon a discussion of the property question Sir Charles sought to disparage our characterization of the seals (1) by terming them free swimming marine animals and classifying them with birds of the air and fish, though the scientists had classified them quite otherwise, (2) by saying that all the United States does on the islands is (a) to have people there to prevent raids and (b) not to kill all the seals, and (3) by further saying that "If the United States had nobody there the seals would be there . . . all the more because of the absence of man or human interference," thus ignoring the fact that without our guardianship both on water and on land the seals would long ago have been exterminated by marauders.

With this faulty picture of the situation before him Sir Charles proceeded to analyze the authorities produced by the United States to show that under certain conditions wild animals may become the subject of property and not unnaturally reached the conclusion that these authorities were not applicable to the instant case. I note three of his claims bearing on the right of property, namely, (1) That no possession of a seal can be had on the islands until it has been killed (which error, with its vital bearing on the question of property in the seals, is exposed later at its repetition by Sir Richard Webster), (2) that the United States has not explicitly asserted ownership of the seals through any statute (which is true but takes no note of the fact that the statutes forbid the killing of any seal except as authorized, this amounting to an implied assertion of ownership), (3) that the doctrine of *animus revertendi* does not apply in the case of migratory animals but only where it has been induced by the effort of man (such a distinction is not based on reason, and *Blades v. Higgs*, 13 C. B. 850 holds that "the common law affirms a right of property in animals *ferae naturae* if they were restrained either by habit or inclosure . . . either their own induced habits or confinement imposed by man").

None of the British counsel really came to grips with the realities of pelagic sealing; they would approach them only to shy away from them. Sir Charles's principal comments on the activities of the British Commissioners who furnished the main evidence for the British on the facts are that "they have spoken in general of the right of pelagic sealing . . . , that they have approached the subject with free open minds and that 'if they had been partisans they would have insisted that no killing should take place except at sea.'" But this is precisely what they did when in their report they said, "If all killing of seals were prohibited on the islands, sealing at sea might be

indefinitely continued," and that "some such arrangement would offer perhaps the best and simplest solution of the present conflict of interests." With becoming modesty Sir Charles says, "I leave this subject, not venturing to express an opinion of my own . . ."—in which he was perhaps wise.

After making light of our industry on the islands by asserting that all we do there is to kill the seals, Sir Charles arraigned as fanciful and an ingenious afterthought the right of self defense claimed by us in respect of such industry on the high seas. He attacked vigorously the authorities we had cited, and yet an examination of his comments thereon discloses many interesting similarities in the two points of view. The hovering and quarantine acts he justified "on the principle that no civilized nation will encourage offenses against the laws of another State, the justice of which laws it recognizes." He also declared that "A nation will not interfere to throw the mantle of its protection over one of its nationals when that national has for his own private ends been running counter to a just and reasonable law of a friendly power." These were also our claims, however, and they applied to the case of the seals because the law against the killing of female seals was for the reasons shown obviously a just and reasonable one.

Sir Charles justified the action of the Canadian government in the Caroline case on the ground that it exercised a belligerent right in a "strict emergency," which was the case; but the measure was obviously taken also as one of self defense against a band of robbers even though they were operating in friendly foreign territory, and it was as a measure of self defense that our government and counsel justified it. He was in accord with the quoted principles declared by Chief Justice Marshall in *Church v. Hubbard* but dismissed them as irrelevant on the ground that the case related to illicit trading and involved the same principle as the hovering acts; this, however, does not touch our claim that the action was of a self defensive nature taken on the high seas in respect of a municipal regulation. As to the Ceylon pearl fisheries lying in deep water well beyond territorial limits, he held that they stood in a position "perfectly unique" and that "for many generations the owners of Ceylon had (have) with the acquiescence of all the powers been allowed to claim to exercise dominion in respect of these fisheries which are contiguous to the coast beyond the three mile limit." With this explanation our counsel were in entire accord, but they went further and held that from the outset and prior to the time when acquiescence had become a fact the protective measure was a proper one in defense of a maritime industry appurtenant to Ceylon.

As to most of the regulations here in question, including those relating to the Scotch herring and the New Zealand fisheries extending over large bodies of non-territorial waters, and to hair seals, our opponents maintained that they affected only nationals, whereupon an American counsel expressed a desire to know whether any one would rise on the British side and state that foreigners would be permitted to violate these regulations with impunity.

No answer was forthcoming but on another occasion Sir Charles explained that the citizens of the territories concerned usually have special advantages, including "a base of operation which foreigners have not; and foreigners resorting to those fisheries must come within the territorial jurisdiction for some purpose or other connected with their pursuit of fishing and . . . they thereupon become subject to the laws of that territory, etc." This was an avoidance of the issue, and the question of what would happen to foreigners who in their intrusions might be able to dispense with a base of operation was left untouched, nor did British counsel ever undertake to say what would happen if such interests were actually violated by foreigners. It is a remarkable fact that no instance was cited where this had occurred, and in seeking the underlying principle governing the situation American counsel asserted, as already pointed out, that where the restrictions were reasonable ones they were protected by the usage of nations, that such usage was based on the right of self defense, which had never been surrendered, and that the regulations were notice to the world that the nation concerned would defend such interests against all intruders.

Sir Richard Webster followed Sir Charles Russell, speaking for four days. Having preceded the latter in the office of Attorney General, it had fallen to his lot to prepare the British Case which he had expected to present as Chief Counsel, but a sudden change of Ministry resulted in Sir Charles becoming the Attorney General shortly before the proceedings began whereby Sir Richard became his junior. In opening, the latter adverted to this fact, saying that acting as a junior involved work of a type he had "not been permitted to do for seven years." He was one of the outstanding lawyers of England with a distinguished presence and a manner less aggressive than that of his senior. Since both covered substantially the same ground in their arguments I shall refer only to an incident in Sir Richard's address through which the question of property in the seals was clarified in accordance with the contentions of American Counsel.

Mr. Coudert having declared in the course of his address some two weeks earlier that "upon the islands the seals are as much our property as though they were sheep or calves," Sir Charles broke in with the words "Certainly not," to which Mr. Coudert, somewhat dismayed, replied, "Well I gave you credit (for knowing this) and I now take it back," then passing on to another point. Sir Richard Webster now reverted to Mr. Coudert's claim and remarked that it was "radically unsound" and he reinforced these words with the following: "Unquestionably the only way of acquiring property in the fur seal is to kill it." "My point, Sir, is that until it is killed there is no property in anybody at all." Sir Richard was, however, dislodged from this erroneous position (as Sir Charles should have been from his) through an inquiry from the President as to whether possession could not be taken of a living seal, to which he replied, "Of course, I suppose I ought to have included that," and he continues:

Of course if you have a pond staked out on the shores of the Pribilof Islands and you drive the seals into that water and keep them there and feed them every day . . . you have reduced those seals into possession. You can possess a living seal as well as a dead one.

Thereafter nothing more was heard of the false doctrine that on the islands only a dead seal could be the subject of property and the question of property in useful wild animals on one's land was thereafter properly made to turn on something quite different, namely, whether or not there was "possession." Without acknowledging his forced retreat from his earlier position Sir Richard now put the matter thus: "No property at all could be acquired in a seal inside or outside territorial waters till possession had been taken. . . ."

Possession is a word of many meanings, but for present purposes the excellent definition supplied by British Counsel will suffice. Speaking of the possession of wild animals Sir Richard said: "The test of sufficiency is that they can be taken at pleasure with certainty"; he cited a passage from Savigny showing that the test of possession of wild animals is whether they "may be caught at any moment." It having been shown by irrefutable evidence that on the islands the government can "take seals at pleasure with certainty" and that they "may be caught at any moment," it follows that under the tests advanced by British Counsel the government there has full possession of these animals and that Mr. Coudert was correct in stating that under these circumstances they were the property of the government on the islands. To question the fact of our possession there hardly makes sense seeing that throughout many years the government has with no difficulty and with great discrimination taken the male increase of the herd to the extent of 100,000 per annum for commercial purposes. And the property so acquired on the islands is continued when the seals leave them because they do so with the fixed intention of returning as they have been known to do for over 100 years.

Sir Richard says, "There is no case of the doctrine of *animus revertendi* being applied except where the animal has previous to its departure been in some place in which possession has been or could be in fact taken." On that point there is no disagreement. And he further says that "If there be absolute property in a thing that property follows the thing when it goes and does not depend upon geographical bounds at all."

Having thus proved that under the authorities our government owns the seal herd resorting to the Pribilof Islands it follows that it had at all times the right under orders of the Executive to protect it against intrusion on the high seas and was justified in seizing and taking into port the foreign vessels hereinbefore referred to; but their condemnation and the imprisonment of their crews was unwarranted because these things were done under a municipal statute which was without effect in non-territorial waters.

The last argument on the British side was presented by Mr. Christopher Robinson, of Canada. It was his special province to justify pelagic sealing

but in this he was not very happy. Having stated that it was "a perfectly justifiable and proper industry" and a "respectable employment" he also said "I think it has its objections." As to the opening of gravid females with "the milk and blood flowing in streams on the decks" he frankly said, "I do not defend this or say it is right," and yet he failed to propose any regulations which would eliminate the slaughter either of gravid or nursing females, perhaps because this could not be done except through the prohibition of the very "industry" he was seeking to defend.

An arbitrator having asked Mr. Robinson whether the tribunal had the power to prohibit pelagic sealing in case this were found necessary for the preservation of the seals, the reply was, "You may regulate but not prohibit"—in other words the tribunal would in the supposed case be powerless to prevent the destruction of the seals although it had been convened to do just that.

At the outset of his argument in reply Mr. Phelps in a few words brought the tribunal back to the stark realities of pelagic sealing through the destruction of the females with young and those engaged in nursing pups which perished with the death of their mothers. He added that the resources of accomplished British counsel had been exhausted in efforts to avoid or circumvent these realities by arguing that the tribunal must get rid of its ideas of right and wrong because they were not law, that the extermination of these seals would be a matter of small consequence, that "if you give them what counsel are pleased to call a fair sporting chance for their life all the dictates of humanity are answered." He said that the sheet anchors of the British case were two propositions, the first that you cannot shut up the open sea and the second that a municipal statute is bounded in its operation by territorial limits. "To these they perpetually return and seem to feel hurt that we should put the case on very different grounds." The argument of the pelagic sealers, he said, was based on the fallacy that in destroying the seal herd they were exercising a clear right, which begged the question. After repeating that this conduct was "barbarous, inhuman, and shocking in its revolting details" he continued: "If this is the freedom of the seas . . . then the sea becomes the only element on the face of the earth in which conduct universally repressed by criminal law can be perpetrated with impunity as against a nation that is gravely injured by its consequences." This telling point was not met.

Much of Mr. Phelps' argument on the doctrine of self defense has in order to obviate repetition been summarized in connection with that of Mr. Carter and in the review of Sir Charles' comments on the American authorities. I add a few separate quotations from his address, some of them apposite to questions of the day.

Jurisdiction is sovereignty and is confined to territory, self defense is not confined except by the necessity and propriety of the case and has nothing at all to do with jurisdiction.

If you maintain the unquestioned right of Great Britain in the pearl fisheries, I ask on what ground you are expected to discriminate the case of the seals because . . . these animals are ten times as much attached to the coasts as the fish. . . . The case of the seal is ten times stronger than that of the oyster.

I say the freedom of the sea is the right to do upon it everything that is inoffensive and which works no injury to anybody, that it stops there and that all these cases which my learned friends were struggling with . . . to find some particular answer to each case, or find escape from the necessity of answering the question by saying "that question is not likely to arise" or "that might be settled by agreement," all of them are immediately answered when you bring them to that plain test; is the conduct inoffensive, or is it injurious?

We contend that this case of ours, this right of property or protection, call it what you please, is as completely established by the just principles of international law as it is by the consideration of ethics and morality.

The President having inquired whether war might not result from an assertion of the right of self defense on the high seas the answer was that this is often a possibility when a nation asserts a right beyond its territorial limits but that in cases of the class under discussion it is only a very remote contingency and for the reasons given has never yet happened. Mr. Phelps closed his argument with a discussion of possible regulations to be made by the tribunal. Having stated that "here we encounter the most strenuous resistance to any sort of regulation that puts any real restriction on the business of pelagic sealing" he warned the tribunal that the only effective regulation would be one prohibiting all pelagic sealing except such as might be carried on by coastal Indians as a means of livelihood in their canoes.

The hearings came to an end on July 8 and thereafter the arbitrators met in conference until August 8 when the tribunal announced its award.

THE AWARD

The essential features of the award were as follows:

First. The tribunal held by a vote of six to one (Justice Harlan voting with the majority) that by the treaties of 1824 and 1825 Russia admitted that her jurisdiction in Bering Sea "should be restricted to the reach of cannon shot from the shore and that from that time up to the cession of Alaska Russia never asserted or exercised any exclusive jurisdiction in Bering Sea or any exclusive rights in the seal fisheries beyond the ordinary limit of territorial waters." It further held by a unanimous vote that the phrase "Pacific Ocean" included Bering Sea. The writer is of the opinion that these two decisions were correct.

Second. The tribunal held by a five to two vote that the United States "has not any right of protection or property in the fur seals . . . when such seals are found outside the ordinary three mile limit." Justice Harlan wrote a dissenting opinion in which Senator Morgan concurred. It is to be

regretted that the majority wrote no opinion, for a statement of the grounds on which they had reached their conclusions on the many difficult questions argued before them with great thoroughness by eminent counsel would have been a material contribution to the cause of arbitration; also it would seem that the United States was entitled to be informed as to such grounds.

The writer's views in respect of this decision are that the tribunal erred in failing to declare the seal herd the property of the United States. On the other hand the American arbitrators by applying well established principles to the novel features of this case and thus concluding that the United States owned the seals, showed in their dissent that international law was not static but an institution of growth which as in the past could in proper instances be adapted to new circumstances. The writer is in full accord with the able dissenting opinion of Justice Harlan.²

Third. The type of regulations called for by the treaty was such as would afford "proper protection and preservation of the fur seal," and in this connection the protocols of the arbitrators are illuminating. A resolution by the two American arbitrators that no extent of pelagic sealing should be allowed which would seriously endanger the proper protection and preservation of the seals was voted down by the five other arbitrators, who in slightly varying forms held that the preservation of the seals should be regulated, "not in the absolute interest of the species, but in the interest of the human industries of which it is the object . . . whether they be exercised on land or at sea, and without having to favor one to the detriment of the other." This of course read into the treaty something that was not there, and it is unthinkable that our government would have entered into any treaty containing such a clause. In addition the arbitrators concerned went counter to the following statement made by the British Government in 1890:

It has been admitted from the commencement that the sole object of the negotiation is the *preservation of the fur-seal species for the benefit of mankind* and that no consideration of advantage to any particular nation, *or of benefit to any private interest*, should enter into the question (present writer's italics).

The regulations adopted by the majority, composed of the two British and the three neutral arbitrators prohibited in their essential features the killing of fur seals (a) at any time in Bering Sea within a 60 mile zone around the Pribilof Islands (b) between May 1 and July 31 in both the Pacific Ocean and Bering Sea. In addition (a) operations were to be carried on only by means of sailing vessels with canoes and undecked boats, (b) the use of nets, firearms, and explosives was forbidden in Bering Sea, but elsewhere the use of shotguns was permitted. These regulations, although falling far short of what was required, placed substantial restrictions on

² For an interesting discussion of the claim of property in the fur seals see an article by Benjamin F. Tracy in the North American Review for May, 1893.

pelagic sealing and to that extent constituted a temporary victory for the United States.

The writer is of the opinion (1) that the majority erred inexcusably in their misconstruction of the treaty, whereby they subordinated the proper protection and preservation of the seals to the exigencies of the so-called industry of pelagic sealing, (2) that, in the light of the proof as to the devastating effects of pelagic sealing and its incompatibility with the continued existence of the herd, the majority failed signally in their duty in not prohibiting all pelagic sealing except such as had without appreciable detriment to the herd been for many years carried on by Indians in their canoes as a means of livelihood. The two American arbitrators voted for its complete prohibition. The full vindication of the claims of American counsel and the American arbitrators as to the necessity of prohibiting all pelagic sealing was to follow in due course.

THE AFTERMATH

Within a year of the adjournment of the tribunal it became apparent that notwithstanding the restrictions imposed it had sanctioned pelagic sealing to an extent that meant the gradual extinction of the seals, the pelagic catch exceeding 61,000 in 1894 and in 1895 56,000. The tribunal had ordered that its findings be reexamined by the two governments in five years; the destruction of seals was such that our government twice requested Lord Salisbury to consent to their earlier review but this request was refused. No relief was forthcoming until 1911, when, under the four-power or North Pacific Sealing Convention between the United States, Great Britain, Russia, and Japan, all pelagic sealing was prohibited under heavy penalties with no killing permitted except on the islands. In return the United States agreed to deliver severally to Canada and Japan 15% of any skins taken on the islands, or their value, such being the price at which a wasteful and barbarous practice was terminated. And what happened then? The estimated number of seals at the islands rose rapidly from some 200,000 in 1912 to over 2,000,000 in 1941, showing the marvelous recuperative powers of the species as soon as the destruction of the females had ceased; and as the herd increased it became possible by slow degrees to raise the annual killing of young male seals on the islands from some 3,000 in 1911 to over 34,000 in 1918 and then on to nearly 95,000 in 1941.

Thus, thanks to the determination to protect and preserve the Alaskan seal herd shown by the Cleveland administration in 1886, followed in the face of many obstacles and discouragements by persistent efforts on the part of the Harrison and later administrations to the same end, the contentions of our government as to how alone this could be accomplished were at long last vindicated and this fine species of useful animals thereby given a new lease of life.

NON-RECOGNITION IN THE COURTS: THE SHIPS OF THE BALTIC REPUBLICS

By HERBERT W. BRIGGS

Of the Board of Editors

Non-recognition by the United States Government of the absorption of Estonia, Latvia, and Lithuania by the Union of Soviet Socialist Republics in 1940 has confronted our courts with a series of questions reminiscent of the period of our non-recognition of the Soviet Government.

One of the first cases in the current series arose in the U. S. District Court for the Eastern District of New York when one Juri Silberberg, resident of Tallinn, Estonia, brought a possessory libel against the S. S. *Kotkas*, an Estonian-owned vessel lying in the port of New York, and her master, Ernest Kallas. The Acting Consul General of the Republic of Estonia in New York, Johannes Kaiv, filed an answer as claimant.¹

Libellant sought to have the vessel delivered to him on the ground that he was the true and lawful owner; that he had appointed Kallas master; that on or about September 1, 1940, libellant had removed Kallas as master and demanded possession of the vessel, but that the demand had been refused.

Kallas' answer alleged that the true owner of the vessel was not Silberberg, but certain named persons, all residents of Tallinn, Estonia; that Silberberg's libel was not filed in good faith, but "was filed under the instigation, duress, or threats of the Russian Government which confiscated the S. S. *Kotkas* and other ships belonging to the above named owners for the purpose of taking the vessel to the port of Murmansk, pursuant to a confiscation decree of the Russian Government, promulgated since the annexation of the Republic of Estonia by the Russian Government, without compensation to her real and true owners."

Kaiv claimed the vessel as the duly accredited Consul General of the Republic of Estonia, recognized as such by the United States Government, alleging that under Estonian law in force prior to the Soviet annexation he was "the constituted trustee" of the property of any Estonian national incapable of acting for himself.

At the trial the proctor for Silberberg offered no competent testimony and rested, subject to an application for the issuance of letters rogatory "to the Supreme Court of the R.S.F.S.R. of the Soviet Union" for the purpose of proving ownership. Kallas and Kaiv proved the existence of certain decrees, promulgated by an Estonian Government after the Soviet occupation of Estonia, nationalizing banks, large industrial enterprises, mines, and transportation enterprises.

¹ *The Kotkas. Silberberg v. The Kotkas et al.* 35 F. Supp. 983 (1940).

Judge Galston held, in dismissing the libel on November 22, 1940, that there was no evidence that libellant was the owner of the *Kotkas*; that "the record establishes from the various decrees of the Government after the Russian occupation that the *Kotkas* . . . was among the properties nationalized"; that "from these governmental decrees it would appear that none of the persons forming the 'ship enterprises' could any longer give orders concerning the ships, or powers of attorney relating to any interest in the ships, because, as between them and the Government of Estonia as occupied and controlled by the United Soviet Socialist Republic [*sic*], the Government became the owner. So this suit would fail for that reason if for no other."

However, the court added, "there was offered in evidence a communication from our State Department as of October 24, 1940, reciting that this Government does not recognize the absorption of Estonia by the Union of Soviet Socialist Republics and, indeed, continues to recognize Johannes Kaiv (*i.e.* the claimant) as acting Consul General of Estonia. . . . Not only does our Government not recognize the validity of these [Estonian] decrees but also the executive order of the United States Government, No. 6560 of April 10, 1940, supplemented by executive order of July 15, 1940, popularly known as 'freezing orders,' in effect prevents the transfer of property of nationals of invaded countries so that such property may not inure to the benefit of the aggressors."

With reference to the application for letters rogatory Judge Galston held that their issuance "to a court of the Soviet Republic for the purpose of taking depositions in Moscow of residents of Tallinn, Estonia, must be denied, for under existing relations between this Government and the Republic of Estonia, no legal process could issue from the Supreme Court of the R.S.F.S.R. of the Soviet Republic to residents of Estonia."

In the case of *The Regent*,² decided in the same court the same day, Judge Galston, in dismissing for the same reasons a similar possessory libel brought

² *The Regent*. *Latvijas Kugniecibas Sabiedriba v. The Regent et al.* 35 F. Supp. 985 (1940). Because the parties subsequently reached an agreement for the operation of the vessel, the court reopened the case to permit the appointment of Joseph G. Kearns and Charles Recht as joint trustees to operate the vessel, and of Daniel F. Young, Inc., as operating agent of the trustees, all such persons having been chosen by the parties. "On August 8, 1942, a petition was filed on behalf of Alfred Bilmanis, as Minister Plenipotentiary, Envoy Extraordinary, and Consul General of Latvia in the United States, by his attorney, which petition recites that it was made under the authority of the treaty between the United States and the Republic of Latvia; that the *Regent* was owned by one Jaris Freimanis, a Latvian national and resident of Riga, Latvia; that on or about June 17, 1940, the Union of Soviet Socialist Republics seized the Republic of Latvia, and that since said date the people thereof have not had a free choice in the making of decisions respecting their property; that on June 22, 1941, the armed forces of the German Reich entered the Republic of Latvia and by force of arms expelled the semblance of government which had wrongfully been set up in the Republic of Latvia by the Union of Soviet Socialist Republics. It is further recited that at the present time the Republic of Latvia and its people are free from the mandates and duress of the Union of Soviet Socialist Republics, but are coerced under the duress of the armed

by a Latvian company against a Latvian vessel, and in denying a similar motion for the issuance of letters rogatory "to a competent court of the U.S.S.R. in accordance with an exchange of notes between the United States of America and the United Soviet Socialist Republic [*sic*], dated November 22, 1935," added that since "the United States of America does not recognize the occupation of the Baltic Republics by the U.S.S.R., it does not appear that any competent court in Russia could issue effective process to the residents of Latvia."

Subsequent to Judge Galston's decision in *The Kotkas*, a further possessory libel was brought against the S. S. *Kotkas* (renamed *Farida*) by Sovfracht, a Soviet corporation.³ The hearing came before Judge Byers on exceptions raised by Consul General Kaiv, who was again the claimant. Mr. Kaiv recited that he had renamed the vessel, placed her under Panamanian registry, and, on February 21, 1941, chartered her to a Canadian company. Sovfracht asked for delivery of the vessel and specific performance of a "charter-party covering the S. S. *Kotkas* (renamed *Farida*) entered into on or about July 20, 1940, by Oskar Tiedemann for and on behalf of the owners." The court on March 31, 1941, sustained the exceptions and dismissed the libel because "it appears that there is a dispute between foreigners," including "an arm of the U.S.S.R. asserting rights over a vessel originally of Estonia as charterer," and now a Panamanian vessel, and the Consul General of Estonia. Said Judge Byers: "Since the United States has withheld its recognition of the submergence of Estonia into the U.S.S.R., the occasion is deemed appropriate to refuse to entertain jurisdiction of this controversy in this court, by reason of our unfamiliarity with the complex questions of foreign law which are manifest from an examination of papers before the court. Ever since *The Belgenland*, 114 U. S. 355, the right of the District Court so to decline to act has been clear."

In the meantime, a possessory libel had been filed in the U. S. District Court for the District of Maryland in the name of A/S Merilaid and Com-

forces and officials of the German Reich; that Latvia is recognized by the United States of America as an existing, independent, political entity; that the United States does not recognize the Soviet invasion and forceful annexation of Latvia, and did not sanction the attempt to include it in the Union of Soviet Socialist Republics, and that the United States Government still does not recognize the absorption of Latvia nor the legality of the so-called naturalization [nationalization] acts or decrees affecting property in the Republic of Latvia." Since the *Regent* had been torpedoed and Freimanis had died, petitioner asked for the dismissal of the libel, the termination of the trusteeship of Recht and others, and the payment of freight earned and insurance collected to the administrator of the estate of Freimanis. The petition was denied by Judge Galston on November 6, 1942, in part because petitioner had failed to dispel a previous admission by his counsel that Freimanis was not a Latvian national but was a naturalized German citizen. The trustees were instructed to hold the trust fund subject to the orders of the court. Cf., *The Regent*, 47 F. Supp. 995 (1942), from which the above quotation is made.

³ All Union Chartering Company (Sovfracht) v. S. S. *Kotkas* (renamed *Farida*) and Ernest Kallas. 1941 American Maritime Cases 555. U. S. District Court, E. D., N. Y. (1941).

pany against another Estonian vessel, the S. S. *Kuressaar*,⁴ then lying in timore harbor. On January 31, 1941, Judge Calvin Chesnut dismissed libel on the ground that libellant had failed to prove that it was the party in interest, and that, in fact, Merilaid and Company had not authorized the suit. In an oral opinion (reported in 1941 A.M.C. 1190). Chesnut found that the suit had really been brought to obtain possession of the vessel for "the Russian Government"; that the action had been initiated by a Special Russian Bureau which had notified Amtorg, its American agent, to "look after some ten or twelve named Estonian ships" as a result of the expropriation decrees promulgated by "the New Estonian Government" subsequent to the Soviet occupation of Estonia; that Merilaid and Company had not voluntarily of their own free will authorized counsel to bring the possessory libel; that if the expropriation decrees were legally effective, Merilaid and Company had no power to bring the action, since they had no private ownership in the vessel after the decrees; that, however, the United States has not recognized the change of government in Estonia but continues to recognize Johannes Kaiv as Acting Consul General "with appropriate diplomatic status, representing the Estonian Government," and that the action or non-action of the State Department" was conclusive on the matter. Judge Chesnut declined to pass upon the validity of the title to the vessel claimed by the claimant, the Estoduras Steamship Company, which had been organized by Consul General Kaiv to take title and preserve the ship for her original owners.

The next case involving cognate questions was a libel by Oskar Tiede against the S. S. *Signe* (renamed *Florida*) and the Estoduras Steamship Company, Inc.⁵ Proctors for libellant, in order to procure the testimony of libellant, Tiedemann, who was resident in Tallinn, Estonia, moved for the issuance of letters rogatory to the "Supreme Court of the Russian Federated Socialist Republic, Union of Soviet Socialist Republics at Moscow . . . or such Court or Courts of competent jurisdiction exercising jurisdiction in the City of Moscow, U.S.S.R." The motion was denied by Judge Caillouet in the U. S. District Court for the Eastern District of Louisiana April 4, 1941. "Letters rogatory," said the court, "are the medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of procedure peculiar thereto and entirely within the latter's control, to perform the administration of justice in the former country; such request being usually granted, by reason of the comity existing between nations in ordinary peaceful times." By an executive agreement (continued in court) concluded by exchange of notes between the United States and the Union of Soviet Socialist Republics on November 22, 1935⁶ it was specified

⁴ A/S Merilaid and Company v. S. S. *Kuressaar*, also known as S. S. *Merida*, and J. Tarius. 1941 A.M.C. 1190 (1941).

⁵ *The Signe*. Tiedemann v. *The Signe* et al. 37 F. Supp. 819 (1941).

⁶ Cf. U. S. Executive Agreement Series No. 83.

provided that letters rogatory issued by United States courts for execution in the Union of Soviet Socialist Republics should be addressed to the Supreme Court of "that constituent republic" of the U.S.S.R. "which is competent to execute such letters rogatory" or to "the competent Court of the Union of Soviet Socialist Republics." However, continued Judge Caillouet, it was unthinkable that such letters rogatory should issue in the present case: "this nation does not recognize that the Supreme Court of the Russian Soviet Federated Socialist Republic, Union of Soviet Socialist Republics, at Moscow, is justly vested with legal jurisdiction over any part of Estonia, but, on the contrary, officially deprecates and condemns the action of the Union of Soviet Socialist Republics in attempting to absorb into the Russian Soviet Federated Socialist Republics the hitherto autonomous nation of Estonia."

When the cause came to be heard in admiralty, Judge Caillouet, on July 22, 1941, dismissed,⁷ for failure to prove any right to possession of the *Signe*, both Tiedemann's libel and an intervening libel by the Estonia State Cargo and Passenger Steamship Line. Because of the light they throw upon the transactions here reviewed, the court's "Findings of Fact" deserve citation at some length: On June 17, 1940 the armies of the Union of Soviet Socialist Republics invaded the hitherto sovereign and independent Republic of Estonia; "3. Thereafter a government entirely subservient to the Union of Soviet Socialist Republics and supplanting that of the Republic of Estonia was set up in Estonia, under the aegis of the Union of Soviet Socialist Republics; 4. The government so set up nationalized or confiscated shipping enterprises in Estonia, among which was that of the partnership of Kasmu Shipowners (Kasmu Laeva-Omanikud), owners of . . . the *Signe* . . . ; 5. Thereafter . . . on or about August 6, 1940, the Republic of Estonia was physically absorbed into the Union of Soviet Socialist Republics; 6. The United States Government does not recognize such absorption of Estonia by such Union of Soviet Socialist Republics, nor the present governmental régime functioning in such republic, nor any of the acts of said régime; 7. The Treaty of Friendship, Commerce, and Consular Rights between the United States and Estonia, dated December 23, 1925, is considered in effect by the United States Government; 8. Said government continues to recognize Johannes Kaiv to be the duly accredited Acting Consul General of Estonia in the United States and in charge of Legation for the temporarily supplanted Government of the Republic of Estonia."

The court found further that the authority allegedly conferred by Oskar Tiedemann on his attorney Charles Recht to file the libel against the *Signe* "was conferred by said Tiedemann when under duress from the then functioning but unrecognized Government of the Estonian Soviet Socialist Republic, a constituent governmental structure in the Union of Soviet Socialist Republics, which was created to forcibly supplant the Government of the Republic of Estonia"; that the proctors of Tiedemann have no proper author-

⁷ *The Signe* (renamed *Florida*). 39 F. Supp. 810 (U. S. D. C., E. D., La., 1941).

ity to represent him; that the real party in interest is none other than the Estonian Soviet Socialist Republic whose creation by the U.S.S.R. and whose absorption of the Republic of Estonia are not recognized by the United States. With reference to the intervening libellant, the court found that the Estonian State Steamship Line was a corporation organized by decree of the U.S.S.R. "under the laws of the republic of Estonia, U.S.S.R." to take over the *Signe* and similar nationalized vessels, and that it had failed to prove its claimed right to possession. The right of Consul General Kaiv to act as trustee under the laws of the Republic of Estonia was upheld, and the claimant Estoduras Steamship Company, organized by him to protect the owners' rights, was held entitled to possession.⁸

On appeal to the Circuit Court of Appeals the decision was affirmed on February 20, 1943.⁹ Judge McCord found that at the time the "Estonian-Russian decrees" were promulgated the *Signe* was in Cuba under control of her master and part owner (who had testified that he had not authorized anyone to sue for him), and held that neither libellant, who was under duress when he authorized the filing of the libel, nor intervening libellant, "which is a creature of the Russian Government," had proved a right to possession. "The United States Government" said the court, "does not recognize the government set up in Estonia after the invasion"; moreover, "for aught appearing, the Russian Government may no longer possess and control Estonia. We take knowledge of the fact that by force of arms Germany has usurped and taken custody and control of Estonia from Russia, and that the status of Estonia as a nation will be determined by future events." The court then found that since Kaiv is recognized by the United States as the duly accredited representative of the only government for Estonia recognized by the United States, his organization of the Estoduras Steamship Company to conserve the property rights in trust for the original owners and the changing of the *Signe's* registry from that of Estonia to Honduran registry were proper, and held that the District Court properly allowed Estoduras to retain possession of the vessel in trust for the co-owners.

The case of *The Denny*¹⁰ presents an interesting variant. A possessory libel was brought in the name of Lietuvos Zemes Ujio Kooperatyvu Sajunga Lietukis (Agricultural Coöperative Association of Lithuania Lietukis) and Lietuvos Baltijos Lloydas (Lithuanian Baltic Lloyd, Limited) against the S. S. *Denny* and her cargo and against the Lithuanian-American Import and Export Corporation (Litamcor), a New York corporation. The Latvian State Cargo and Passenger Steamship Line, a corporation of the Republic

⁸ The court discharged a trustee hitherto appointed by it and ordered him to surrender the vessel to Estoduras. Cf. Oskar Tiedemann et al. v. S. S. *Signe* (renamed *Florida*) and Estoduras Steamship Co., Inc., 1941 A. M. C. 1008 (U. S. D. C., E. D., La., Jan. 2, 1941), where earlier events are summarized.

⁹ *The Florida*. Tiedemann et al. v. Estoduras Steamship Company, Inc., 133 F. 2d 719 (C. C. A., 5th, 1943). Certiorari denied, 63 Sup. Ct. 1439 (1943).

¹⁰ *S. S. Denny*. 40 F. Supp. 92 (U. S. D. C., N. J., July 22, 1941).

of Latvia, Union of Soviet Socialist Republics, intervened, claiming ownership and a right to possession of the vessel. The court found that both libellants were Lithuanian associations organized under the laws of the Republic of Lithuania prior to the Soviet occupation and that, at least prior to June 17, 1940, Lithuanian Baltic Lloyd was the owner of the vessel, and Lietukis was owner of the cargo; that Litamcor was their American agent; that in June, 1940, the armies of Soviet Russia invaded Lithuania; that in July, 1940, a Lithuanian Soviet Socialist Republic was established in Lithuania; that "on July 26, 1940, pursuant to and in accordance with the Constitution of the Union of Soviet Socialist Republics," there were enacted laws (and "decrees were promulgated by the Prime Minister, Acting President of the Republic") nationalizing all industrial and commercial enterprises in Lithuania and expropriating their properties and assets; that "pursuant to and in accordance with the nationalization decrees, the libellants were divested of all right, title and interest in and to their properties and assets;" that on August 3, 1940 "the application"¹¹ of the Lithuanian Soviet Socialist Republic to be absorbed into the Union of Soviet Socialist Republics was accepted, but that neither such absorption by the U.S.S.R. nor the "sovereignty" of the Lithuanian Soviet Socialist Republic had been recognized by the United States, which continued to recognize as a sovereign state the Republic of Lithuania. The court found further that duly accredited representatives of the Republic of Lithuania in the United States had authorized the appointment of Litamcor as trustee to hold and operate the vessel (and its cargo) for the benefit of the owners.

In dismissing the libel, Judge Smith held that libellants, having been dissolved by operation of Soviet law, were without capacity to maintain the suit: "they no longer exist as juridical persons; . . . they are no longer *in esse* within the territorial limits of their former existence, and, therefore, should not be granted extraterritorial rights." Moreover, the powers of attorney under which the suit was instituted by the purported attorney-in-fact, were void, having been executed under Soviet coercion, "if not actual, implied." It was "suspiciously significant" that although the nationalization decrees had divested libellants of their property and all authority in the administration of their affairs, nevertheless the decrees had preserved the "validity" of the signatures of those officers who had, prior to the decrees, been authorized to act for the companies, and who purportedly authorized this action.

It is a well-established rule, continued the court, that a suit in a court of admiralty may be maintained only by the real party in interest; "it is apparent that the libellants are not the real parties in interest; . . . it is evident that the real party in interest is the said Lithuanian Soviet Socialist Republic"; but "it cannot be disputed that the Lithuanian Soviet Socialist

¹¹ This phrase is taken from the opinion of the Circuit Court of Appeals, 127 F. 2d 404, 408n.

Republic, as the real party in interest, may not maintain this suit either directly or indirectly in the absence of recognition of its sovereignty by the Department of State. . . . A suit on behalf of a foreign state may be maintained in our courts only after recognition of its sovereignty and only by that government which is recognized as its authorized government. . . . The question of sovereignty is a political question, the determination of which by the political department of the government conclusively binds the courts."

As for intervener, the Latvian State Cargo and Passenger Steamship Line, the court found that it was organized on October 25, 1940, "under the laws of the Republic of Latvia, Union of Soviet Socialist Republics, . . . under authority of a decree of the Council of People's Commissars of the Union of Soviet Socialist Republics"; that although designated in the statute a "separate economic organization having the right of a juridical person," it was not in fact an independent entity, but was "an instrumentality of the government of its creation," subject to the exclusive control of Narkommorflot, a division of the government. Furthermore, it had been organized for the sole purpose of taking over nationalized shipping and had no right, title, or interest as claimant except as "predicated entirely upon the nationalization decrees." In dismissing intervener's claim because intervener was "an instrumentality of the Soviet Government of the Lithuanian Soviet Socialist Republic" the court said: "If access to the courts must be denied a foreign government because of its failure to achieve recognition, it must likewise be denied an integral part of that government."

The court then stated that, although not a court of equity, a court of admiralty may apply equitable principles in the determination of the rights of parties within its jurisdiction. This suit was a mere fiction; "the actual relief sought is [the] enforcement of the nationalization laws"; but the court could not fail to take cognizance of the fact that when libellants were free to exercise their independent judgment they had appointed Litamcor their American agent; "it is our opinion that the libellants, if permitted a free choice at this time, would continue that relationship"; the dismissal of the libel will permit Litamcor to retain custody of vessel and cargo in trust for libellants subject to the supervision of the Consul General of the recognized Republic of Lithuania; so only can the status quo be preserved "until conditions are more settled."

Were there inconsistencies in the court's conclusions? "On first reading," conceded the court, the opinion "would seem to present some inconsistencies," but closer study would reveal that this is not the fact: "There is a distinction between according recognition to a foreign government and recognizing the effect of its laws upon persons and property within its jurisdiction. While the courts may not accord recognition to a foreign government which has failed to achieve that status, they are not required to ignore the effect of its laws upon persons and properties within the territorial limits of its jurisdiction."

On appeal to the Circuit Court of Appeals the decision was reversed.¹² In the meantime, because of delay in filing an appeal and the departure of the *res*, the court found that "neither the district court nor this court now has such jurisdiction *in rem* as would support a decree awarding possession of the vessel and its cargo." The libel had also been *in personam*, however, for damages for wrongful detention of vessel and cargo by Litamcor, and the court therefore took jurisdiction *in personam*. In reversing the decision of the District Court, the Circuit Court of Appeals (*per* Judge Maris) found that the District Court had acted upon insufficient evidence in concluding that the powers of attorney, under which Lithuanian Baltic Lloyd and Lietukis had instituted the libel, were executed under duress; that the conclusion of the District Court that the Soviet nationalization decrees had operated to deprive libellants of their juridical personality was likewise based upon insufficient evidence, at least in so far as it implied that they did not continue in existence to the extent of being able to grant powers of attorney to collect their assets. However, to the argument "that since the Government of the Lithuanian Soviet Socialist Republic and its admission to the Union of Soviet Socialist Republics have not been recognized by our government this court may not, by permitting Recht to act under powers of attorney given to him, recognize or give effect to the decrees of the Soviet Socialist Republic which reorganized Lietukis and nationalized Baltic Lloyd," the court replied: "But these are both Lithuanian associations and the parties in interest, so far as here appears, are all citizens of Lithuania and domiciled therein. The rights of American citizens or residents are not involved. We may not ignore the fact that the Soviet Socialist Government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220. It follows that the respondents may not question in this court the validity of the Lithuanian decrees in so far as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the associations' officers and offered in this proceeding." The District Court had therefore "erred in dismissing the libel in so far as it set up claims of Lietukis and Baltic Lloyd¹³ against the respondents *in personam*," the decree was reversed and remanded with instructions "to reinstate the libel of Lietukis and Baltic Lloyd solely as to the claims therein *in personam* for damages."

Analyzing the cases just presented, it appears that in *The Kotkas* and *The*

¹² *The Denny*. Agricultural Coöperative Ass'n. of Lithuania Lietukis et al. v. *The Denny* et al. (Latvian State Cargo & Passenger S. S. Line, Intervener.) 127 F. 2d 404 (C. C. A., 3rd, March 27, 1942.) Rehearing denied April 21, 1942.

¹³ The court found that the authority of Charles Recht to act for intervener State Steamship Line had not been established.

Regent the libels were dismissed (1) because the libellants failed to prove ownership; (2) because the Soviet nationalization decrees had deprived private shipowners of their power to institute such actions; (3) because the United States Government does not recognize either the absorption of the Baltic Republics into the U.S.S.R. or the validity of the Soviet decrees in question; and (4) because of the "freezing orders." The apparent inconsistency between the second and third reasons advanced for dismissing the libels can probably be explained as a holding that, although the court is prepared to acknowledge that the Soviet nationalization decrees produced certain effects in the occupied territories, nevertheless, because of non-recognition by our State Department, the court will not give them full effect here. The issuance of letters rogatory in the same two cases was refused because, in view of the non-recognition by the United States Government of the Soviet occupation of the Baltic Republics, a United States court should not assume that the courts of the U.S.S.R. could exercise any authority over the residents of the occupied Baltic States. In *All Union Chartering Company (Sovfracht) v. S. S. Kotkas* the libel was dismissed because the dispute was between foreigners, the court explaining its refusal "to entertain jurisdiction" on the ground that one of the parties was "an arm of the U.S.S.R. asserting rights over a vessel originally of Estonia" whose submergence into the U.S.S.R. the United States did not recognize. In *The Kuressaar* the libel was dismissed "upon the narrow ground" that libellant was not the real party in interest and had not voluntarily authorized the institution of the action. The court found it unnecessary to decide whether the Soviet nationalization decrees had operated to deprive libellant of its title to the vessel, but was of the opinion that, "if these decrees are legally effective," libellant had no power to bring the action, adding, however, that the expropriatory decrees were those of an unrecognized government, and non-recognition by the State Department was conclusive on the court.

The first decision in *The Signe* (*Tiedemann v. The Signe*) was a clear-cut refusal to issue letters rogatory to the courts of a state whose exercise of authority in the territory where the letters rogatory were to be executed was not recognized by the United States. In *The Signe* (renamed *Florida*) the libel was dismissed (1) because neither libellant nor intervening libellant proved its claim to possession; (2) because libellant was under duress from the unrecognized Estonian Soviet Socialist Republic when he purported to authorize the institution of the action; and (3) because intervening libellant (the Estonia State Steamship Line), created to take over nationalized shipping in territory whose absorption by the U.S.S.R. was not recognized by the United States, had no standing in court. In *The Florida* the Circuit Court of Appeals affirmed these findings and emphasized that a corporation whose claim was based upon nationalization of shipping consequent upon an absorption of Estonian territory which we did not recognize—and which had since been lost to Germany—asserted no title which could prevail over the

title of the company organized by the duly accredited representative of a recognized government-in-exile to preserve the rights of the original owners.

This opinion in *The Florida* is the only one in the current series which even remotely approaches the distaste for confiscation exhibited by the New York courts in the well-known cases in which effect was refused to Soviet confiscatory legislation. The reason is clear. The pattern into which all these possessory libel cases fall involves, in effect, the rejection of Soviet claims to the vessels as soon as the Soviet interest is unmasked. The technique is simple: the libellant is not the real party in interest and the claim may therefore be dismissed without discussion of the morality of confiscation.

The Government of the U.S.S.R. is recognized by the United States Government and the question arises why the possessory libels were not brought openly in the name of the Soviet Government instead of through dummy libellants of record. The answer can apparently be found in the legal consequences the courts feel bound to derive from political non-recognition, and the Soviets therefore resorted to subterfuge. In so doing they merely provided the courts with an additional ground for dismissing the suits, for the courts never lost sight of non-recognition. Whether the real parties in interest were the *unrecognized* Estonian or Lithuanian Soviet Socialist Republics (as the courts persisted in stating) or the *recognized* Union of Soviet Socialist Republics (as the evidence before the courts appeared to show) was immaterial on point of non-recognition: if the former, they could be refused access—directly or indirectly—to the courts as unrecognized governments; if the latter, the same result would follow on the ground that the claim of the recognized government of the U.S.S.R. to exercise authority in the territories of the Baltic Republics was not recognized by the State Department.

Similarly, on the question whether effect should not sometimes be given to the public acts of an unrecognized government, the courts differed, but, except in *The Denny* before the Circuit Court of Appeals, reached the same result: the libel could be dismissed. If, because of political non-recognition, effect were refused here to the Soviet nationalization decrees, the companies would be regarded as still in existence, but since they had not voluntarily authorized the suits, proctor had no authority to represent them. If, however, despite political non-recognition, the decrees were regarded as having operated to terminate the existence of the companies, the companies were dead and could not bring suit.

Thus in *The Denny* the District Court first gave effect to the Soviet nationalization decrees by holding that they had operated to deprive the Lithuanian associations of their existence, and then held that, because of non-recognition, the real party in interest, the unrecognized Lithuanian S. S. R., was incompetent to sue either directly or indirectly. On appeal the Circuit Court of Appeals held in effect that the District Court had misread the Soviet decrees; that there was no evidence that nationalized associations did not survive for purposes of liquidation; that the libellants of record were not de-

funct companies masking a real party in interest but were themselves the real parties in interest attempting to collect their assets. Since the authority of the proctor to act for the intervener, an instrumentality of the Soviet governments, had not been established, the court found it unnecessary to decide whether an unrecognized government can sue in our courts. This opinion of the Circuit Court is as unsatisfactory in its refusal to see the Soviets as the real party in interest as the other opinions were in throwing out the cases once they detected a Soviet interest which they felt they ought not to "recognize."

Why did those courts which were prepared to acknowledge that the Soviet decrees had changed title to the property refuse to allow the new owners to assert title in our courts? The questions raised in *The Jupiter, No. III* and the *Navemar* cases—namely, whether effect should be given to foreign confiscatory decrees where the *res* was outside the territorial jurisdiction of the government purporting to confiscate—were not considered in any of the cases here under review. The ostensible reason for refusing to allow the new owners to assert title in our courts was that they did not come openly; but the courts were generally agreed that non-recognition by the United States Government of the Soviet absorption of the Baltic States had imposed upon the Soviets a procedural incompetency to bring suit in our courts, either directly or indirectly, in order to assert property rights derived from that absorption. Reasons, some perhaps good, can be advanced for the doctrine that on political questions the courts must follow the political branches of the government, but the question may be raised whether the procedural incompetency based solely upon non-recognition might not be eliminated, so as to permit any *de facto* government access to any court of competent jurisdiction in which it is willing to have its claims adjudicated.

FIFTY YEARS OF ARBITRATION IN THE UNION OF INTERNATIONAL TRANSPORT BY RAIL

By MANLEY O. HUDSON and LOUIS B. SOHN

Too little attention has been given to the remarkable development of international arbitration in the Union of International Transport by Rail. Within the limited field of this Union arbitration has been organized on a solid and continuing basis, and a permanent tribunal for the settlement of disputes has been maintained for half a century.

The Union of International Transport by Rail was established by Austria-Hungary, Belgium, France, Germany, Italy, Luxemburg, the Netherlands, Russia and Switzerland under the Convention on the Transport of Goods by Rail of October 14, 1890;¹ ratifications of the Convention were deposited on September 30, 1892, and the Convention entered into effect on January 1, 1893. Some of the provisions of the 1890 Convention were modified by Conventions signed on July 16, 1895, June 16, 1898, and September 19, 1906. The 1890 Convention was superseded by the two Conventions on the transport of goods by rail and the transport of passengers and luggage by rail, signed on October 23, 1924, which entered into force on October 1, 1928.² The 1924 Conventions were superseded by the two Conventions signed on November 23, 1933, which entered into force on October 1, 1938.³ In 1939 the 1933 Conventions were in force between Belgium, Bulgaria, Czechoslovakia, Danzig, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Rumania, Sweden, Switzerland, Turkey, Yugoslavia.⁴

In the course of the drafting of the 1890 Convention, at conferences held in 1878 and 1881, it was proposed that an international tribunal be created for the settlement of disputes between railway administrations, composed either of judges appointed directly by each of the contracting states, or of seven judges selected among its members by a directing commission in which all contracting states were to be represented.⁵ The final text of the 1890 Convention provided, however, only for the creation of a Central Office of International Transport by Rail to facilitate and assure the execution of the Convention, and Article 57 of the Convention set forth the

¹ For the text see 19 Martens, *Nouveau recueil général de traités* (2d ser.), p. 289.

² For the texts see 2 Hudson, *International Legislation*, pp. 1393, 1468.

³ For the texts see 6 *idem*, pp. 527, 568. See also 7 *idem*, p. 896.

⁴ Spain's position in the Union continued to be regulated by the 1924 Conventions.

⁵ 13 Martens, *Nouveau recueil général de traités* (2d ser.), pp. 60, 282-4, Cf., G. de Seigneux, *Commentaire du projet de convention rédigé par la conférence internationale réunie à Berne* (1882), pp. 64-70.

duty of the Central Office to give judgments, on the demand of the parties, in disputes which might arise between railways—*de prononcer, à la demande des parties, des sentences sur les litiges qui pourraient s'élever entre les chemins de fer*. This provision was continued in the later Conventions without modification. In a *règlement* annexed to the 1890 Convention, the Federal Council of the Swiss Confederation was designated to organize and supervise the Central Office; rules of arbitral procedure for dealing with disputes brought before the Central Office—*règlement fixant la procédure d'arbitrage pour les litiges portés devant l'Office central des transports internationaux*—were promulgated by the Federal Council on November 29, 1892.⁶ Upon reports of the Central Office and proposals of the Swiss Federal Department of Posts and Railways slight changes were made by the Federal Council in this *règlement* in 1894, 1897, 1929, and 1940; but the present *règlement*, in force since July 15, 1940, follows very closely the original text of 1892.⁷

The *règlement* provides that arbitral decisions under Article 57 of the Convention shall be given by the Director of the Central Office with the assistance of two judges-arbitrators; but that, at the request of the parties, or if a case is of slight importance or of an urgent character, the Director of the Central Office may give a decision without the assistance of the judges-arbitrators. The two judges and two substitute judges were to be designated by the Swiss Federal Council. They were to be remunerated by *per diem* allowances, and to be reimbursed for travelling expenses. A secretary of the Central Office was to serve as registrar of the tribunal. The proceedings were placed under the control of the Director of the Central Office. He was to fix the time-limits within which the parties should present documents, to make arrangements concerning the forwarding of the documents of written proceedings to the judges, to prepare the statement of facts as well as of the conclusions upon which the arbitral tribunal had to decide, and to convene the tribunal and preside over it. In case of disagreement between the Director and the two other judges, the substitute judges were to be called upon and the case was to be decided by a tribunal of five instead of three members. In the event of an equality of votes, the opinion of the Director was to prevail. When the Director was unable to serve, the Vice-Director was to take his place. Officials of the Central Office, other than the Director, might participate in the examination of a case, and might be asked to take part in the deliberations of the tribunal, but with a consultative voice only. The decisions of the tribunal, signed by the Director and by the registrar, were to be communicated to the parties without charge.

Over a period of fifty years the Swiss Federal Council has regularly appointed the Directors of the Central Office and the judges and substitute

⁶ Swiss *Bundesblatt*, 1892, V, pp. 554-5.

⁷ 48 *Bulletin des transports internationaux par chemins de fer* (1940), pp. 362-4. The text is reproduced in an appendix to this article.

judges to serve with him as members of the arbitral tribunal. All of the appointees have been Swiss and in most cases they have been men who have held high administrative or judicial office in Switzerland. The appointments have been made without limit of time, and vacancies have been promptly filled. The first appointments were made in 1892, and the latest in 1941. The following have served as Directors of the Central Office:

1893-1900. *Numa Droz*, a former member of the Swiss Federal Council, with wide experience in international conferences.

1900-1902, 1917-1921. *Louis Forrer*, advocate and a member of the Swiss National Council; he resigned in 1902 upon his election as member of the Swiss Federal Council, but was re-appointed in 1917.

1903-1908. *Johannes Winkler*, a member and President of the Swiss Federal Tribunal, umpire in the *Meerauge* arbitration between Austria and Hungary in 1902, arbitrator in the Italo-Peruvian Commerce Treaty Interpretation Case in 1900; after his resignation in 1908, he was appointed judge of the arbitral tribunal in 1914.

1908-1917. *Hans Weber*, a judge of the Swiss Federal Tribunal.

1922-1927. *Hans Dinkelmann*, President of the General Direction of the Swiss Federal Railways.

1928-1935. *Emile Lohner*, State councilor in the Canton of Bern, and member of the Swiss National Council.

1935-1938. *Reinhold Fuller*, General Director of the Swiss Posts, Telegraphs and Telephones; he resigned upon his appointment as Director of the International Bureau of the Universal Postal Union.

Since 1938. *Anton Schrafl*, President of the General Direction of the Swiss Federal Railways.

The following have served as judges of the arbitral tribunal:

Emile Welti, a former member and President of the Swiss Federal Council, President of the 1886 Bern conference on transport by rail; appointed in 1893, he served as judge until his death in 1899.

Georges de Seigneux, president of the *Cour de Cassation* of the Canton of Geneva, and long identified with the codification of international transport law; appointed judge in 1893, he served until his death in 1912.

Paul Speiser, a member of the Swiss National Council and professor of law at Basle; appointed substitute judge in 1893, and judge in 1899, he resigned in 1907.

Friedrich Meili, professor of law at Zurich, widely known for his works on international law, member of the Institute of International Law; appointed substitute judge in 1893 and judge in 1907, he served until his death in 1914.

Ferdinand Gentet, professor of international law at Geneva, a former judge of the *Cour de Cassation* of the Canton of Geneva; appointed in 1912, he served as judge until his death in 1919.

Johannes Winkler, a former Director of the Office; appointed in 1914, he served as judge until 1922.

Paul Müri, appeal judge in the Canton of Aarau; appointed substitute judge in 1907 and judge in 1922, he served until 1931.

Charles Meckenstock, President of the cantonal tribunal of Neuchâtel; appointed judge in 1922, he resigned in 1937.

Leo Merz, advocate and State councilor in Bern; appointed substitute judge in 1922, and judge in 1937, he resigned in 1941.

John Nosedá, advocate; appointed substitute judge in 1922, he has been judge since 1937.

Arthur Homberger, professor at Bern; appointed substitute judge in 1932, he has been judge since 1941.

The following additional persons have served as substitute judges on the arbitral tribunal:

Edward Russenberger, a former director of the Swiss North-Eastern Railways; appointed in 1899, he resigned in 1907.

Richard Temme, advocate in Basel; appointed in 1907, he served until 1922.

Jean Spiro, advocate, deputy-judge of the Federal Tribunal at Lausanne; appointed in 1937.

Robert Haab, professor at Basel; appointed in 1941.

Most of the judges have served for long periods, almost half of them for more than ten years, and three for more than twenty years. In its decisions the tribunal was thus able to draw to a remarkable extent upon the accumulated experience of its members. Only in a few cases have the judges resigned because of preference for another career; in most instances their resignations were due either to impaired health or old age. Six of the members of the tribunal died while holding office; an exceptionally strong spirit of loyalty to the office is apparent.

In the course of fifty years twenty-two disputes were brought before the Central Office for arbitral decision. In each case the parties were railway administrations, state or private. Most of the cases were international in the sense that they had arisen between railway administrations of different national character; in each of the two cases in which the opposing railway administrations possessed the same national character the dispute arose in connection with international transport. Only the administrations of railways inscribed on the list provided for in Article 58 of the Convention could be parties to disputes submitted to the Central Office;⁸ individuals were not given access to the tribunal.⁹ The jurisdiction of the tribunal was exercised only with the consent of the parties to the dispute, and such consent had to be given *ad hoc*. The proceedings before the tribunal consisted entirely of written documents. Usually the decisions were based on an agreed statement of facts or on a *dossier* filed by one of the parties; additional explanations were requested when necessary. Memorials were often filed

⁸ 1 *Bulletin* (1893), p. 216. Cf., 18 *idem* (1910), pp. 380-2.

⁹ Proposals to give jurisdiction to the Central Office over disputes between administrations and individuals were repeatedly rejected. Cf., 4 *Bulletin* (1896), pp. 206-7; *Procès-verbaux de la deuxième conférence pour la révision de la convention internationale du 14 Octobre 1890* (Bern, 1905), pp. 76-80; *Travaux préliminaires de l'Office Central . . . en vue de la révision de la C.I.M. et de la C.I.V.* (1932), p. 96.

by the parties and at times also replies and rejoinders. In most cases one party was considered as claimant and the other as defendant. The decisions vary in form, though all contain a statement of the facts, the legal grounds, and the conclusions (*dispositifs*). In the conclusions the tribunal either rejects a claim or, admitting a claim, states the obligations of the parties. The decision is usually called a *sentence arbitrale*, or a *décision arbitrale* (*schiedsgerichtliche Entscheidung*), but the conclusions sometimes refer to the *jugement* (*Urteil*). The decisions were usually given in the name of the "Central Office functioning as an arbitral tribunal." They were notified to the parties, and published in French and German versions in the official *Bulletin* of the Central Office. The published texts seldom indicate the composition of the tribunal deciding the case; they do not state whether the decisions were unanimous, but no dissenting opinions were published. In four of the twenty-two cases the decision was given by the Director of the Central Office without the assistance of the judges.

The variety of the cases dealt with may be indicated by the following summary:

(1) *Claim of the Kaschau-Oderberg Railway of Budapest* (1893).¹⁰ This claim was based upon an attachment in Germany of credits due to the claimant from certain German railways; a declaratory judgment was sought that under a provision in Article 23 of the Convention the credits were not subject to attachment. On the ground that the German railways had not submitted to the exercise of jurisdiction the tribunal declared that the claim was not receivable and refused to give an advisory opinion (*avis doctrinal*).

(2) *Claims of the Mediterranean Railway Company of Italy* (1895).¹¹ These claims related to surtaxes on shipments from France to Italy over the Paris-Lyon-Mediterranean Railway. Notice of the claims was sent to the latter company by the Central Office, the opinion being expressed that the case seemed to fall under the provision in Article 57 of the Convention. No reply was made by the P.L.M. and, as the Italian company had not expressly asked for an arbitration, the tribunal held that the case had not been properly submitted by the parties to the dispute. Invoking its earlier decision, the tribunal declared that it was limited to giving a judgment (*sentence*) and could not give an advisory opinion (*avis doctrinal*).

(3) *Belgian State Railways—Württemberg State Railways* (1897).¹² The parties to this dispute agreed upon its submission to arbitration by the Central Office and the tribunal declared itself competent. The Württemberg State Railways sought reimbursement from the Belgian State Railways of the sum of 19.23 marks, part of an indemnity paid to a consignee for a delay in shipment; the Belgian State Railways sought to justify the delay as due to the restriction of service on Sunday but it failed to prove this contention and the tribunal held the defense to be unfounded.

¹⁰ 1 *Bulletin* (1893), pp. 215–17.

¹¹ 3 *Bulletin* (1895), pp. 244–5.

¹² 5 *Bulletin* (1897), pp. 220–3.

(4) *South German Frontier Railways v. Swiss Railways* (1897). (The Swiss railways involved were those belonging to the Association of Swiss Material, exclusive of the Gothard Company).¹³ This case was brought before the Central Office by the filing of a claim by the German Railways; as the Swiss Railways expressly submitted to the jurisdiction, the tribunal held itself competent, declaring that its jurisdiction was not limited with reference to the subject-matter of disputes. The claim related to the basis upon which compensation should be paid for the use by one railway of rolling-stock belonging to another railway. As there existed no convention between the parties the tribunal proceeded to apply "the general principles of law and equity"; in particular, it based its decision on the principle that the loan of cars was an inherent part of international transportation, and that in consequence the lending administration should be reimbursed for its construction and maintenance expenses. The statistical materials submitted by the parties were only approximate, but the tribunal found it inadvisable to ask for an opinion of experts and limited its decision to the question whether the sum demanded by the applicants was equitable; it refused to pronounce upon the general question as to which system of calculation of the costs was, in general, preferable. As the tribunal's own calculations corresponded quite closely to those made by the applicants it decided that the applicant administrations were entitled to receive from the respondents the whole sum demanded.

(5) *French Eastern Railways, Alsace-Lorraine Railways, Palatinate Railways, Baden State Railways, Main-Neckar Railway and Prussian State Railways v. Warsaw-Vienna Railway* (1898).¹⁴ This case was submitted to the Central Office by the French Eastern Railway, with the agreement of the other interested companies. The French Eastern Railways, having satisfied the claim of a shipper of silk for loss occurring in the course of the transport, sought to be reimbursed to the extent of 600 fr. The tribunal held that under Article 47 of the Convention the entire loss should be borne by the respondent.

(6) *Kaschau-Oderberg Railway of Budapest—Royal Direction of Railways at Magdeburg* (1900).¹⁵ The special agreement by which the parties submitted this dispute to arbitration placed before the tribunal two questions relating to the attachment in Germany of credits due to the Kaschau-Oderberg Railway and to the application of Article 23 of the Convention. Interpreting the Convention in accordance with its "spirit" and its purpose to facilitate international transport by assuring *le bénéfice de l'exterritorialité*, the tribunal held that the attachment in Germany was invalid.

(7) *French Eastern Railway Company—Royal State Railways of Prussia and Imperial Railways of Alsace-Lorraine* (1900).¹⁶ This dispute was submitted to arbitration by a special agreement between the parties. The

¹³ 5 *Bulletin* (1897), pp. 893-934.

¹⁴ 7 *Bulletin* (1899), pp. 17-21.

¹⁵ 8 *Bulletin* (1900), pp. 83-7.

¹⁶ 9 *Bulletin* (1901), pp. 2-10.

German administrations were represented by the Royal Railway Direction at Erfurt. The claimant sought reimbursement of a sum of 381.20 francs, paid to a consignee for damage to a shipment. Applying provisions of a particular convention between the parties, as well as provisions of the general Convention, the tribunal held that, to the extent of 95 francs, the indemnity should be borne by all the interested companies and that the remainder of the sum paid should be borne by the claimant.

(8) *Belgian State Railways v. Royal State Railways of Wurtemberg, Royal State Railways of Prussia, Royal Bavarian Railways of the Palatinate and Grand-Ducal State Railways of Baden* (1900).¹⁷ The parties having agreed to submit the dispute to arbitration, an application was filed by the Belgian State Railways as complainants (*demandeurs*). Only part of a shipment of apples arrived at the destination, and these were in bad condition; the complainants admitted liability for a part of the loss, contending that they were not liable for the remainder. The tribunal exonerated all of the respondents except the Royal State Railways of Prussia, which, because of insufficient proof presented, were held liable for the remainder of the loss.

(9) *Royal Prussian and Grand-Ducal Hessian Direction of Railways at Mainz v. Direction of the Palatinate Railways at Ludwigshaven and co-interested administrations* (1902).¹⁸ The parties agreed to the arbitration of this dispute by the Central Office. It related to damage sustained by a shipment of roof-tiles from St. Avre-la-Chambre to Worms, for which the complainants had paid the consignee 397 marks, 50 pfennigs. The parties were agreed that no liability fell upon the French railways engaged in the transport. The tribunal held that the entire loss should be borne by the complainants.

(10) *Royal Prussian and Grand-Ducal Hessian Direction of Railways at Mainz v. Direction of the Palatinate Railways at Ludwigshaven and co-interested administrations* (1902).¹⁹ This dispute, submitted to arbitration by agreement of the parties, related to an indemnity paid by the complainants to a consignee of a shipment of mushrooms. The complainants contended that under Article 47 of the Convention the whole loss should be borne by the chief respondent or, alternatively, by all the railways concerned except the complainants. The tribunal held that three-fourths of the indemnity should be borne by the chief respondent.

(11) *Direction of the Belgian State Railways at Brussels v. Royal Prussian Direction of Railways at Cologne* (1902).²⁰ The parties agreed upon the submission to arbitration of a dispute concerning responsibility for damage to a shipment of glass from Stolberg to Brussels, due to the bad state of a railway car. The tribunal found the Prussian Railway at fault and held that under Article 47 of the Convention it should bear the entire loss; but it took note of an *offre gracieuse* made by the Belgian State Railways to divide the loss, and gave a decision to that effect.

¹⁷ 9 *Bulletin* (1901), pp. 41-8.

¹⁸ 11 *Bulletin* (1903), pp. 38-46.

¹⁹ *Ibid.*, pp. 46-54.

²⁰ *Ibid.*, pp. 107-16.

(12) *Direction of the Swiss Seetal Railway v. Administration of the Belgian State Railways* (1904).²¹ This proceeding was instituted by the Swiss Seetal Railway; doubt was expressed by the Belgian State Railways as to the applicability of Article 57 of the Convention, but no formal objection to the jurisdiction was offered. The parties agreed that the decision should be given by the Director of the Central Office without the assistance of the judges. The Director declined the request of the Swiss Seetal Railway that evidence be sought from the individual consignee, the Central Office possessing no powers of constraint and the proofs offered being sufficient. The parties disagreed as to which of them should sue for the transport charges; the decision was that the burden fell on the Swiss Seetal Railway to demand and collect the charges due.

(13) *Alsace-Lorraine Railways v. Railway Company of the French Midi* (1905).²² Though the parties had agreed upon the submission of this dispute to arbitration, the respondent contested the competence of the Central Office on the ground that, as the transport had originated in Spain, and as Spain was not then a party to the Convention, the case was not covered by the Convention. The tribunal found that no condition had been attached when the respondent had agreed to the submission of the dispute, and it noted that the respondent had submitted arguments on the merits; holding that a dispute might be dealt with under Article 57 of the Convention though the transport had not been covered by the Convention, the tribunal declared itself competent. The complainant sought from the respondent payment of transportation charges and reimbursement of expenses incurred in its effort to collect them. The tribunal found that the respondent was at fault in its failure to issue a new way-bill for the extended shipment from a point in France to Basel, but that the complainant was at fault in its failure to collect the charges on delivery. The complainant had erroneously given credit for the charges to a French company, but the tribunal held that under the provisions of all civil laws involved this error could not be considered essential; the claim to invalidate this credit was dismissed.

(14) *Administrations of the Gothard Zone (Gothard Railway, Swiss Federal Railways, Alsace-Lorraine Railways, Baden State Railways, Palatinate Railways, French Eastern Railways and Belgian State Railways) v. Administrations of the Brenner Zone (Austrian Southern Railways, Bavarian State Railways and Prussian-Hessian State Railways)* (1907).²³ This dispute was submitted to the Central Office by the General Direction of the Imperial Railways of Alsace-Lorraine with the agreement of all administrations concerned. It related to the interpretation of a convention between the parties which allocated the transport of food-stuffs from Italy by dividing Italy into two zones, a community zone and an exclusive Gothard zone. Food-stuffs loaded partly in the community zone and partly in the exclusive zone were

²¹ 12 *Bulletin* (1904), pp. 150-60.

²² 13 *Bulletin* (1905), pp. 332-44.

²³ 15 *Bulletin* (1907), pp. 85-100.

shipped from Italy on a common way-bill made out in advance in the community zone; the Gothard zone administrations claimed that the goods actually loaded in the exclusive zone should be credited to it. Interpreting the convention in the light of the "intention" of the parties, the tribunal upheld the claim of the Gothard zone administrations in its entirety.

(15) *Belgian State Railways*, acting in their own name and on behalf of the *French Northern Railways v. Railways of Alsace-Lorraine* (1907).²⁴ The parties having agreed to submit this dispute to the Central Office, the case was brought before it by an application of the Belgian administration. The complainant railways had agreed to divide the responsibility for damage to a shipment of wool but the respondent refused to pay a share on the ground that a French court had declared the French administration responsible and also on the ground that the damage could not have occurred on the Alsatian line. The tribunal found the French judgment inconclusive regarding the question of responsibility; following its earlier decision, in the *Belgian State Railways v. Royal State Railways of Wurtemberg* case in 1900, that the provision as to proof of faultlessness constitutes an exception which was to be strictly interpreted, it found the proof submitted by the Alsatian administration insufficient. Though the Convention provided for distribution of loss in proportion to the transport charges the complainants asked for distribution in proportion to the number of kilometres of transport; as the respondent did not object to this means of distribution the tribunal held the respondent liable on the latter basis.

(16) *Bavarian State Railways v. French Eastern Railway Company* (1909).²⁵ This case was submitted to arbitration by special agreement. The Bavarian State Railways sought reimbursement of part of an indemnity paid to the consignee of an automobile damaged in transport. On the basis of a Franco-German convention the tribunal held that the respondent was bound to pay the amount claimed. In interpreting the convention the tribunal took into account the object as stated in its preamble and refused to adopt an interpretation which would render a given provision unnecessary; following its earlier decisions, it considered the respondent's proof of faultlessness insufficient.

(17) *Wurtemberg State Railways v. Hungarian State Railways* (1910).²⁶ This dispute was submitted to the Central Office by the Wurtemberg State Railways with the consent of all the administrations concerned. The complainant sought reimbursement of a sum of 157.86 marks, paid to a consignee for damage to a shipment of apples. As the amount claimed was small, and as the questions involved related to the facts, the Director of the Office rendered the decision without assistance of the judges. Invoking the decisions of the tribunal in the *South German Frontier Railways v. Swiss Railways* case in 1897 and in the *Alsace-Lorraine Railways v. Railway Com-*

²⁴ 15 *Bulletin* (1907), pp. 135-45.

²⁵ 18 *Bulletin* (1910), pp. 4-17.

²⁶ *Ibid.*, pp. 375-87.

pany of the *French Midi* case in 1905, the Director held the Office competent regardless of whether the 1890 Convention or a convention of the German Railways Union was applicable; but, inasmuch as one of the participating railways, the Bosnia-Herzegovinian Railways, did not belong to the German Railways Union, the latter convention was held to be inapplicable. As the extent of the damage due to the fact that the Hungarian State Railways had furnished improper cars could not be ascertained, the Director decided the case *ex aequo et bono* and held that one-third of the damage should be paid by the respondent administration alone, the remainder being borne by all of the administrations concerned.

(18) *General Administration of Italian State Railways v. Imperial-Royal Southern Railway Company, Imperial-Royal Administration of the Northern Railways, and Warsaw-Vienna Railway* (1911).²⁷ The Italian State Railways sought reimbursement of a sum of 6946.32 francs paid to a shipper for damage to a carload of lemons. The question in dispute was first submitted to conferences of the Italo-Austrian and Austro-Russian railway administrations but no agreement could be reached. The parties having agreed upon the submission of the case to arbitration, the Italian administration transmitted the *dossier* of the case to the Central Office, with a statement of the views of all the parties, and asked for a decision that its claim against the other railways was well-founded. The Central Office considered this statement as an application instituting proceedings and transmitted copies of it to the other railways. Setting a time-limit for their answers, the Central Office requested the respondent railways to state whether they agreed to the presentation of facts and whether any additional evidence should be taken; it warned them that their silence would be considered an acceptance of the exactness of the statements made in the application. No party contested the jurisdiction or the statement of facts. Holding that the Northern Railways and the Warsaw-Vienna Railway had been negligent, the tribunal decided that, on the basis of equity, the latter should pay four-fifths of the loss and the Northern Railways Administration one-fifth.

(19) *Belgian State Railways v. Bavarian State Railways* (1913).²⁸ This case was submitted to arbitration by application of the complainant, with the consent of the respondent. The complainant had paid compensation to a consignee for damage caused by the use of an open car for a shipment of hare-skins and sought reimbursement from the despatching railway, the respondent, on the ground that the way-bill was not made in accordance with a provision of the Convention. Finding that the way-bill was properly made out, the tribunal dismissed the claim; it refused to interpret strictly the provision in the Convention, considering that such an interpretation would have been inconsistent with good faith; decisions of various national courts were cited in which a broad interpretation had been given of the provision in question.

²⁷ 19 *Bulletin* (1911), pp. 221-9.

²⁸ 21 *Bulletin* (1913), pp. 376-81.

(20) *General Direction of the Belgian State Railways v. Direction of the Railways of the German Reich at Essen* (1922).²⁹ A claim for 4,845 francs as compensation for damage caused by improper use of complainant's railway cars by the respondent was submitted to the Office by the Belgian State Railways with the consent of the respondent; the parties agreed that the decision should be given by the Director alone in view of the slight importance of the case. The Director found it unnecessary to decide whether the German or Belgian law should be applied in the case, the general principle of responsibility for negligence being accepted by both laws. The German administration was held negligent, but on equitable grounds, and in exercise of his "free appreciation" (*d'après la libre appréciation*) (*nach freiem Ermessen*), the Director reduced the amount of indemnity due to 3,600 Belgian francs.

(21) *Italian State Railways v. Austrian Federal Railways* (1924).³⁰ On the basis of Austrian regulations the Austrian Federal Railways refused to accept a shipment of rice from Italy in open cars. An application was filed by the Italian administration asking that the dispute be decided by the Director of the Office alone; notified of the application, the Austrian administration agreed to submit to the Director's decision. The Director refused to apply the Austrian regulations on the ground that according to the object and spirit of Article 5 of the Convention the law of the place of despatch, *i.e.* Italian law, governed the type of cars to be used. In interpreting the Convention, the Director resorted to the *travaux préparatoires* of the 1905 revision conference, and he refused to consider any adverse implications from the fact that the revised Convention of 1924, not then in force, expressly provided that the law of the place of despatch should be applied.

(22) *Italian State Railways v. Polish State Railways* (1931).³¹ This dispute related to compensation for a carload of silk sent from Italy to the Russian part of Poland in July 1914 which had disappeared after crossing the Austro-Russian boundary. The Russian, Polish, Austrian, and Czechoslovak administrations refused to assume responsibility, and after protracted negotiations the Italian State Railways submitted their claim against the Polish administration to the Central Office. During the negotiations the Polish State Railways had declared that they did not object to the submission of the case to the Central Office. Upon receipt of the application the Central Office asked the Polish administration for confirmation of the agreement to arbitrate and the latter repeated that "they submit the case to the Office for arbitral decision". The Central Office then notified the parties of the composition of the tribunal and the parties replied that they had no objections; at this stage of the proceedings the Central Office transmitted to the Polish administration the *dossier* of the case and fixed a time-limit for a reply. In its reply the Polish administration contended that as the question in issue

²⁹ 31 *Bulletin* (1923), pp. 1-7.

³⁰ 33 *Bulletin* (1925), pp. 30-7.

³¹ 39 *Bulletin* (1931), pp. 49-56. This case is summarized in *Annual Digest of Public International Law Cases, 1931-1932*, pp. 417-20.

had arisen in 1914, the claim could be made only against the Russian administration; the Polish administration did not exist at the time, and Poland did not adhere to the Convention until 1922. In view of these facts the Polish administration revoked its consent to arbitration. In a later exchange of correspondence the Polish administration added that its consent to arbitrate the dispute had been based on the assumption that the claim related to action taken by one of the private railroads acquired by the Polish Government after the war and that until the transmission of the *dossier* it had not known that the transport in question was made by the Russian Imperial Railways. After an unsuccessful attempt to obtain an amicable settlement of the dispute, the tribunal held itself incompetent and suspended the proceedings. Declaring that an arbitral tribunal could not pronounce upon the validity of a *compromis* or of its revocation, it said that the dispute should be left to be decided by the competent judge, *i.e.* by the judge of the domicile of the respondent (Article 51 of the Convention) or regulated by diplomatic negotiations between the parties. Decisions of national courts in private arbitration cases were cited by the tribunal. It distinguished the previous cases in which the tribunal had declared itself competent on the ground that in these cases the respondent either had not contested the competence or had taken part in the proceedings regardless of the objection raised, while in the present case the Polish administration refused to take part in the proceedings before it submitted any reply or conclusions. The spirit of the Convention was held to allow the tribunal to take cognizance only of those cases in which it enjoyed the confidence of the parties and in which its judgment might be based on elements presented by both parties.

In its task of interpreting the Convention, the Central Office may give, in addition to arbitral decisions, opinions (*avis* or *renseignements*) of an administrative character. For a time these opinions were published in the *Bulletin* of the Central Office³² as *jurisprudence administrative* or as *decisions: partie administrative*, or as *questions traitées par l'Office Central*.³³ This practice was discontinued in 1896 in consequence of a decision of the revision conference of 1896 that the Central Office should avoid giving opinions in cases in which a dispute might later arise and that, in particular, no advice should be given to individuals.³⁴ In 1907 the Central Office resumed giving information (*renseignements*) to administrations, sometimes even to individuals, and published a digest of its answers in the communications section of the *Bulletin*. In its answers to inquiries the Central Office usually limited itself to quoting relevant provisions without expressing its own views; in

³² Volumes 1-4 (1893-6), and 15-17 (1907-11).

³³ This led some writers to cite the answers as "decisions" or "arbitral decisions" of the Office. Cf. 5 Travers, *Le droit commercial international* (1932), I, pp. 190, 525; III, pp. 745, 753; 10 Eger, *Eisenbahnrechtliche Entscheidungen* (1894), pp. 76-7, 90-3, 158, 191-2, 379, 382.

³⁴ Similar views had been expressed at the 1881 Conference. Cf. 13 Martens, *Nouveau recueil général de traités* (2d ser.), pp. 203, 282-4.

some cases it refused to give any reply on the ground that the question should rather be submitted to a competent tribunal. Since 1911 replies given by the Central Office have seldom been published.³⁵ This function of the Central Office is to be sharply distinguished from its arbitral functions under Article 57 of the Conventions.

Here, then, is a remarkable example of successful arbitration. For fifty years a permanent tribunal, national in composition but international in function, has rendered continuous service in a special and highly complicated field. The very existence of the tribunal may have facilitated the settlement of many disputes which did not come before it.³⁶ The twenty-two decisions which it gave supplied general directives for guiding a coöperative effort pursued on a continental scale and, though chiefly of a technical character, they constitute a valuable contribution to international jurisprudence. In some matters, especially on questions relating to competence and the law applicable, the decisions have an interest for international tribunals generally. The importance of the cases is not to be measured by the monetary claims which were involved. Though the latest decision was given in 1931, the tribunal still exists and its tradition may yet be preserved.

³⁵ Cf. 27 *Bulletin* (1919), pp. 100-3.

³⁶ The question might be raised whether the tribunal would not have been even more useful if its jurisdiction had been obligatory. Cf. a Bavarian proposal of 1898. 6 *Bulletin* (1898), pp. 536, 542.

The non-official International Railway Wagon Union (R.I.V.), an organization of railway administrations created in 1921, gave power to its permanent Committee "to decide, upon demand of one of the adhering administrations, and after hearing the interested parties, all disputes relating to the interpretation and application" of the Union's *règlement* (§ 5 *d* of the 1921 *règlement*). The 1925 *règlement* limited the Committee's competence to questions of "interpretation" and added that the administrations parties to the dispute which were members of the Committee should not participate in the vote upon the dispute; it provided, on the other hand, that the Committee should "give arbitral decisions (*jugements à titre arbitral*), upon request of an adhering administration and after hearing the parties, in all disputes arising out of reciprocal use of wagons." The administrations agreed not to resort to any other jurisdiction. (§ 6, No. 3, *c* and *d*.) Cf. 30 *Bulletin des transports internationaux par chemins de fer* (1922), *Annexe*, pp. 2-3; 32 *idem* (1924), *Annexe*, pp. 196-7. A number of disputes have been submitted to the Committee for decision, 49 *idem* (1941), pp. 173-4. Cf. League of Nations Quarterly Bulletin of Information on the Work of International Organizations, No. 8 (1924), pp. 277-8.

In the non-official Union for the use of passenger and luggage wagons in international transport (R.I.C.) the arbitration procedure prescribed by § 13 of the 1928 Statutes resembles that of the Universal Postal Union: the administrations parties to a dispute choose two other administrations as arbiters; if these cannot agree on the choice, the umpire-administration is to be selected by the directing administration (Swiss). The administrations agreed not to resort to any other jurisdiction. Cf. 36 *Bulletin des transports internationaux par chemins de fer* (1928), *Annexe*, p. 185.

APPENDIX

Règlement fixant la procédure d'arbitrage pour les litiges portés
devant l'Office Central des transports internationaux
par chemins de fer, du 23 avril 1940.³⁷

Article 1^{er}. Les sentences arbitrales prévues à l'art. 57, § 1, lettre c) de la Convention internationale du 23 novembre 1933 concernant le transport des marchandises par chemins de fer (C I M) et à l'art. 57, § 1, lettre c) de la Convention internationale du 23 novembre 1933 concernant le transport des voyageurs et des bagages par chemins de fer (C I V), sont rendues par le Directeur de l'Office Central des transports internationaux par chemins de fer, assisté de deux juges-arbitres.

Le Conseil fédéral suisse nomme ces juges, ainsi que deux suppléants.

Si les parties en expriment le désir, ou si l'affaire est de minime importance ou présente un caractère particulier d'urgence, le Directeur de l'Office peut prononcer sans l'assistance des juges.

Article 2. Le Directeur de l'Office pourvoit à l'instruction de chaque affaire; il fixe aux parties les délais pour la production des pièces; il fait circuler les dossiers chez les juges ou les suppléants; il prépare ou fait préparer l'exposé des faits et les conclusions à soumettre au tribunal arbitral; il convoque et préside celui-ci.

En cas d'empêchement, il est remplacé par le Vice-directeur de l'Office.

Article 3. Si le Directeur de l'Office est d'un autre avis que les deux juges, il a le droit d'en appeler à l'opinion des suppléants, siégeant avec les juges. En cas de parité des voix, l'avis du Directeur l'emporte.

Article 4. Un des Secrétaires de l'Office remplit les fonctions de greffier du tribunal arbitral.

Les fonctionnaires de l'Office qui ont collaboré à l'instruction d'une affaire peuvent être appelés à prendre part à la délibération du tribunal avec voix consultative.

Les sentences sont signées par le Directeur et par le Secrétaire qui a fonctionné comme greffier. Elles sont communiquées sans frais aux parties.

Article 5. Les juges et les suppléants reçoivent une indemnité de 50 francs par journée de séance et d'étude des actes et une indemnité de route égale à celle payée aux membres de l'Assemblée fédérale.

Article 6. Le présent règlement, qui abroge et remplace celui du 6 septembre 1929, entrera en vigueur le 15 juillet 1940.

³⁷ French version from 48 *Bulletin* (1940), pp. 363-4; the German version is also authoritative.

LEGISLATION ON TREATMENT OF ENEMY PROPERTY

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When faced with the problem of how enemy property should be treated in the present war the belligerents have evidently followed in general the procedure of examining the measures taken during the last world war and the application of the provisions in the treaty of peace, in conjunction with their own national laws. They have apparently also considered how closely they should hold to the time-honored principle that during a war the property of enemy individuals and companies should be merely sequestered and not confiscated. Their decision on this point has in some cases apparently been influenced by the nature and extent of enemy property within their territories and by the degree to which it had been and could be utilized for carrying on economic as well as political warfare against the state which had given the property its protection.

Cognizance has also been taken by various countries among the United Nations of the wide ramifications of Axis enterprises and commercial connections overseas, and the definitions of enemies in the laws or decrees are in general so broad as to cover all persons, physical or juridical, in an Axis state who directly or indirectly own property within such a country, as well as persons, whether physical or juridical, in third countries, or in the country itself, who are acting for or under the domination or control of the Axis governments or their nationals or legal entities.

SEQUENCE OF LAWS

Although the Nazi Government precipitated World War II by its attack on Poland it was not the first country to enact legislation concerning the treatment of enemy property. Great Britain entered the war in defense of Poland on September 3, 1939, and on September 5, 1939, its Trading with the Enemy Act ¹ came into force. It would appear that His Britannic Majesty's Government had anticipated the war and had carefully drafted this detailed law in order to enable it immediately to sever all commercial and financial relations with Germany and subject all German holdings and businesses in the United Kingdom to immediate control.

Germany followed over a month later by subjecting enemy property to the regime of its civil law, known as the curatorship-in-absence (*Abwesenheitspflegschaft*). This decree, dated October 11, 1939, was issued for the territory of the Great German Reich in agreement with the High Command of the Armed Forces and the General Plenipotentiary for Economic Matters.²

¹ 2 and 3 Geo. 6 c. 89.

² *Reichsgesetzblatt*, Part 1, No. 202, Oct. 16, 1939, p. 2026.

The decree provided for the appointment of a curator-in-absence for a citizen of an enemy country, notwithstanding the appointment of an attorney-in-fact by the absentee; and for a company or other enterprise if the persons legally authorized to represent it (directors, managers, or partners) were absent.³ The curator, who might be an official or a legal person, was to be named by the guardianship court which would also issue instructions for the curatorship.⁴

The foregoing decree was supplemented by the decrees of October 18, 1939,⁵ and of January 22, 1940.⁶

However, a decree dated November 3, 1939,⁷ required the declaration (*Anmeldung*) of property in the territory of citizens of enemy countries as well as of persons owning establishments therein, and this was superseded by the decree on the treatment of enemy property of January 15, 1940,⁸ which provided, *inter alia*, for the appointment of administrators of enemy-owned or dominated enterprises in Germany. The earlier decree of October 11, 1939, on curatorship-in-absence, was amended by the decree of January 22, 1940, and continued applicable in cases where a foreign enterprise had no branch or seat in Germany. The decree of January 15, 1940, was made applicable with regard to the United States by the decree of April 9, 1942.⁹

Allegedly in retaliation for the freezing orders of the United States Government, a decree was issued by the German Government on August 4, 1941,¹⁰ requiring the declaration (*Anmeldung*) of all property in Germany owned by the United States Government or its citizens or corporations. The regime of administration envisaged in the decree of January 15, 1940, could therefore easily have been put into effect immediately after the declaration of war between Germany and the United States of December 11, 1942. The German Government did not, however, take this action until after the promulgation in the United States of the First War Powers Act, 1941, on December 18, 1941 (which statute amended section 5 (b) of the Trading with the Enemy Act of 1917, to authorize the President to direct the vesting of enemy property) as well as, after the order of February 16, 1942, by which the Secretary of the Treasury vested in himself 97% of the outstanding stock of the General Aniline and Film Corporation, and the vesting orders of the Alien Property Custodian of March 25, 1942, covering two other subsidiaries of the I. G. Farbenindustrie. Again (*i.e.* on April 9, 1942) the Nazi Government gave the impression that it was reluctantly forced to proceed against American property because of the action previously taken against German property by the United States Government.

³ *Reichsgesetzblatt*, Part 1, No. 202, Oct. 16, 1939, arts. 3 and 5.

⁴ *Ibid.*, arts. 1 and 7.

⁵ *Rgbl.*, Part 1, No. 206, Oct. 20, 1939, p. 2056.

⁶ *Rgbl.*, Part 1, No. 20, Jan. 30, 1940, p. 232.

⁷ *Rgbl.*, Part 1, No. 219, Nov. 6, 1939, p. 2141.

⁸ *Rgbl.*, Part 1, No. 16, Jan. 20, 1940, p. 191.

⁹ *Rgbl.*, Part 1, No. 37, Apr. 14, 1942, p. 171.

¹⁰ *Rgbl.*, Part, 1, No. 87, Aug. 7, 1941, p. 472.

By-products of German occupation of various European countries were the laws dealing with alien or enemy property.

Following the subjugation of the Netherlands on May 20, 1940, the Reich Commissioner, Seyss-Inquart, issued a decree, on June 24, 1940,¹¹ modeled after the German decree of January 15, 1940 (*supra*).

Similarly, after the completion of the occupation of Norway on July 10, 1940, Reich Commissioner Terboven issued a decree, dated August 17, 1940, along identical lines.

Denmark was overrun by Germany on April 12, 1940, and, although it nominally retained its sovereignty, its Government, on December 27, 1940, promulgated a law requiring the registration of property of every kind which on April 9, 1940, or subsequently had belonged to aliens, and envisaged a regime of custodianship for such property.

In France a decree concerning sequestration and liquidation was issued on November 23, 1940, which was followed by Law No. 109 of January 19, 1942, signed at Vichy by Marshal Pétain, concerning sequestration as a "measure of general safety."¹²

The other Axis governments followed Germany's example soon after they officially joined the combat. Thus Italy attacked France on June 11, 1940, and on June 28, 1940, King Victor Emmanuel, Mussolini, *et al*, signed a decree governing control, sequestration, and liquidation of all industrial or commercial enterprises in the Kingdom of Italy operated or dominated by subjects of enemy States.

On December 22, 1941, just two weeks after the attack on Pearl Harbor, Japan promulgated the Enemy Assets Control Law and an Imperial Ordinance relative to its application, and on the next day the regulations of the Finance Ministry.

In the Western Hemisphere Canada led the way with an Order in Council, P. C. No. 3959, enacted August 21, 1940, which was amended by P. C. 9797, of December 16, 1941, and is entitled "Consolidated Regulations respecting Trading with the Enemy (1939)."

After the declarations of war of December 7 and 11, 1941, the United States Government resurrected the Trading with the Enemy Act of 1917 and further amended it¹³ by the first War Powers Act, 1941 (Public Law 354), approved December 18, 1941.

Brazil, after its neutrality was violated by the German attack on one of its ships, issued Decree-Law No. 4.166, on March 11, 1942,¹⁴ providing that the property and rights of German, Japanese, and Italian physical or juridical persons should be used to indemnify the Brazilian Government and its resident citizens and companies for damage resulting from acts of aggression

¹¹ Gazette No. 7, CCH War Law Service, Report 79 (3) 4-10-41, pp. 65, 606 *et seq.*

¹² *Journal Officiel de L'Etat Français*, Mar. 10, 1942, p. 970.

¹³ Public Act. No. 91, 65th Congress, approved Oct. 6, 1917, Chap. 106, 40 Stat. 411.

¹⁴ *Diario Oficial*, March 12, 1942, p. 3918.

by the Axis powers. Decrees envisaging the confiscation of certain enemy interests were published on August 25, 1942, after recognition of a state of belligerency, and on September 1, 1942, after recognizing that a state of war with Germany and Italy existed.

After the torpedoing of some of her ships Mexico also took measures against the Axis countries. On June 1, 1942, the President of Mexico declared that since May 22, 1942, the date of the sinkings which followed the Mexican protest for the first sinking, a state of war had existed between Mexico and Germany, Italy, and Japan. The Law of General Precautions (*Previsiones Generales*), relative to suspension of individual guarantees, of June 11, 1942,¹⁵ provides that enemy states and their nationals may effect acts of commerce in Mexico only with the permission of the Government¹⁶ and authorizes the "occupation" of their property and rights.¹⁷ On the same day a law regarding the property and business of enemies was promulgated.¹⁸

With a view to bringing about as much uniformity as possible in measures to eradicate enemy trade in the Western Hemisphere, an Inter-American Conference on Systems of Economic and Financial Control met at the Pan American Union in Washington from June 30 to July 10, 1942. The governments of the twenty-one American republics were represented. The Conference adopted eight recommendations,¹⁹ of which No. VII deals with the control of business enterprises.

COMPARISON OF PROVISIONS AFFECTING BUSINESS PROPERTY

The provisions in the various laws dealing with property reflect the concepts and institutions, on the one hand, of the common law in England, Canada, and the United States and, on the other, of the civil law in Germany, Italy, the occupied European countries, and Latin America. The Japanese legislation might be said to follow substantially that of its Axis allies.

Great Britain

Thus the British Trading with the Enemy Act, 1939, envisages means for (1) inspection and supervision of businesses, (2) controlling or liquidating businesses, and (3) custody of enemy property.

An "inspector" may be named by the Board of Trade to enter the premises of a business suspected of trading with the enemy and make a complete examination of its books and affairs. On receiving the report of the inspector the Board of Trade may appoint a "supervisor," with such powers as it determines, to prevent trade with the enemy.²⁰

When a business is being carried on in the United Kingdom by or on behalf of, or under the direction of, persons all or any of whom are enemies

¹⁵ *Diario Oficial*, June 13, 1942, p. 1.

¹⁶ *Ibid.*, art. 5, par. I.

¹⁷ *Ibid.*, art. 11, par. I.

¹⁸ *Ibid.*, June 13, 1942, p. 6.

¹⁹ Final Act of the Inter-American Conference on Systems of Economic and Financial Control, Washington, D. C., June 30-July 10, 1942: Pan American Union, Congress and Conference Series, No. 39, 1942.

²⁰ Trading with the Enemy Act, 1939, sec. 3.

or enemy subjects, or appear to the Board of Trade to be associated with enemies, the Board of Trade may, within its discretion, issue (1) a "restriction order" to prohibit the carrying on of the business (a) absolutely or (b) except for such purposes and subject to such conditions as may be specified in the order, or (2) a "winding up order" requiring the business to be wound up.²¹ A "controller" is appointed by the Board to carry out either of these orders.

Custodians of enemy property are appointed for England, Scotland, and Northern Ireland, respectively, to receive money which would but for the war be payable to or on behalf of enemies and to preserve enemy property in contemplation of an arrangement to be made at the conclusion of peace. The Board of Trade is empowered to require by order the payment of such money to the Custodian and to provide and regulate the vesting, and to vest, in the Custodian such enemy property, or vest in the Custodian the right to transfer such other property as is not itself vested in him. The order may also confer or impose on the Custodian all the prescribed rights, powers, duties and liabilities as the Board may deem necessary.²²

A vesting order has the same purport and effect as a vesting order concerning similar property made by the High Court under the Trustee Act, 1923. The order itself is sufficient to vest in the Custodian any property or the right to transfer any property without the necessity of any further conveyance, assurance or document.²³

German Law

The concept of custodianship for enemy property under English law has essentially its counterpart in German law, both in the curatorship in absence (*Abwesenheitspflegschaft*), under the decree of October 11, 1939,²⁴ and in the appointment of an administrator (*Verwaller*) under the law of January 15, 1940.²⁵

The curator or guardian (*Pfleger*) is named by the guardianship court (*Vormundschaftsgericht*) which gives him instructions for the conduct of his functions. The administrator is appointed by the provincial court of appeal (*Oberlandesgericht*) of the district where an enterprise has its seat or establishment to assure the protection (*Sicherstellung*) and maintenance (*Erhaltung*) of the property in the case of enterprises belonging to legal entities under private law when the enterprise is directly or indirectly under a predominant enemy influence. The administrator is in charge of the enemy participation as well as the enterprise itself.²⁶

Unless otherwise specified in his appointment the administrator is authorized to perform all judicial and extra-judicial transactions and legal acts

²¹ Trading with the Enemy Act, 1939, sec. 3A.

²² *Ibid.*, sec. 7.

²³ Board of Trade Orders under sec. 7 of the Trading with the Enemy Act, 1939, No. 1198.

²⁴ *Rgl.*, Part 1, No. 202, Oct. 16, 1939, p. 2026.

²⁵ *Rgl.*, Part 1, No. 16, Jan. 20, 1940, p. 191.

²⁶ General Order, Sept. 17, 1940, *Deutscher Reichsanzeiger*, No. 221, Sept. 20, 1940.

involved in carrying on the enterprise. During the period of the administration the powers of the board of directors, the meeting of shareholders, and all managers and officers are suspended. The administrator is required to exercise his functions with the care (*Sorgfalt*) of an ordinary administrator (*eines ordentlichen Verwalters*) under the supervision of the court, and he is liable for any damage resulting from a breach of his duties. The court may at any time terminate the administrator's appointment.²⁷ The foregoing provisions apply also in the case of real property.²⁸

In order to assure the uniform direction of the administration of enterprises, the Reich Minister of Justice is authorized to appoint a Reich Commissioner (*Reichskommissar*). In addition to issuing regulations concerning the introduction, conduct, and termination of the administration, the Reich Minister of Justice is authorized in particular to take retaliatory measures (*Vergeltungsmassnahmen*) if an enemy country subjects protected industrial rights such as patents and trademarks (*gewerbliche Schutzrechte*) or copyrights (*Urheberrechte*), effective in their territory and belonging to German citizens or enterprises, to special measures deviating from the treatment accorded to residents in their territory. The same applies if an enemy country subjects to special restrictions the acquisition of protected industrial rights or copyrights by German citizens or enterprises.²⁹

General regulations concerning the administration of enterprises under predominant enemy influence were published on June 20, 1940.³⁰ They provide that even though a private legal entity is under predominant enemy influence, or if all its shares belong to the enemy, the company itself is not to be looked upon as an enemy and its property is not enemy property.³¹ Furthermore, the regulations state that, while the naming of an administrator is the proper procedure for such an undertaking, absentee curatorship is appropriate where an enterprise has in Germany neither its seat nor a branch.³²

The making of a request to name one or more administrators is exclusively within the province of the Reich Commissioner for enemy property, who prescribes the scope of the functions to be exercised. However, he must show to the court which makes the appointment that the enterprise is under a predominant enemy influence. After an administrator is named, he must obtain the express previous approval of the Reich Commissioner to perform certain important acts such as selling or encumbering real property or rights and undertaking new business establishments or discontinuing existing establishments. The approval of the Court of Appeal is also necessary for such measures of basic significance as modifying the constitution, or selling, changing, or terminating part or all of the business.

²⁷ Decree of Jan. 15, 1940, *supra*, arts. 14, 15 and 16; Regulations, June 20, 1940, par. 19.

²⁸ *Ibid.*, art. 18.

²⁹ *Ibid.*, art. 26.

³⁰ *Deutscher Reichsanzeiger*, No. 144, June 22, 1940, p. 1.

³¹ Regulations, *supra*, par. 3.

³² *Ibid.*, par. 4.

The Reich Commissioner is also empowered to supervise the current activity of the administrator.³³

German-Occupied Countries

The foregoing régime of administration of enemy property is incorporated in the decree of June 24, 1940,³⁴ applicable to enemy property in the "occupied Netherlands if belonging legally and economically to enemies." The administrator is appointed by the Commissioner General for Financial and Economic Affairs and acts under the supervision of the latter but not of the courts as in Germany.

However, another decree, that of July 4, 1940,³⁵ authorizes outright confiscation of property of persons or companies which have fostered, are fostering, or are likely to foster efforts directed against the Germans. This decree obviously applies in the case of Dutch residents of Holland as well as alien enemies.

In occupied Norway Reich Commissioner Terboven himself appoints the administrator and supervises his acts, under the decree of August 17, 1940 (*supra*).

The Danish decree of December 27, 1940, authorizes the placing of the property of "aliens," which was required to be registered, under the administration of an especially appointed custodian who is to safeguard and develop the property and act on behalf of the owner in all legal matters relating thereto. The custodian is under the supervision of the Chancery Division of the Maritime and Commercial Court.

France

The Vichy law of January 19, 1942, already mentioned, concerning "sequestration as a measure of general safety," avoids mention of enemies or even aliens, but it is significant that every act disposing of property which was not definitely dated before May 10, 1940 (just as the Nazis were entering France) is presumed to have been accomplished in order to remove the assets from the measures of sequestration prescribed in execution of the subsequent laws of July 23 and September 10, 1940, and every act accomplished after July 23, 1940 is void. Where sequestration of property is effected, it results in the divesting (*désaisissement*) of the owner.³⁶ The last mentioned provision would seem to imply confiscation, but the law contains no other provisions which clarify this point.

Italy

The Italian law of June 28, 1940, envisages three stages in the treatment of an enterprise operated or dominated by an enemy subject: (1) control, (2)

³³ Regulations, *supra*, pars. 8, 9, 21 and 22.

³⁴ Gazette No. 7, June 27, 1940.

³⁵ *Ibid.*, No. 9, July 6, 1940.

³⁶ Law No. 109 of January 19, 1942, *J. O.*, March 10, 1942, p. 970, arts. 7-9.

sequestration, and (3) liquidation, and impliedly one follows upon the other in inevitable succession.

After an enterprise has been subjected to a controller (*sindicatore*), the competent authorities may, if they consider it advisable, appoint a sequestrator, who represents the enterprise for all purposes. The competent authorities are the Minister of Corporations, in agreement with the Minister of Finance, after hearing the advice of the competent syndical organizations.

The same authorities, after finding that special reasons exist, may then order liquidation. This liquidation is ordered in every case where the enterprise cannot fulfill the obligations pertaining to its operation.

A controller is supervised by the Prefect, the President of the Corporative Provincial Council, and a person appointed by the Minister of Corporations.³⁷

A sequestrator, in order to perform more than ordinary acts of management, must obtain the authorization of the Minister of Corporations, in accord with the Minister of Finance, and he must render quarterly accounts to them.³⁸ These same Ministers also fix the procedure to be followed in liquidating an enterprise.³⁹

The orders establishing the control, sequestration, or liquidation of an enterprise are published in the Official Gazette and deposited with the chancellery of the tribunal in which the enterprise has its seat or establishment.⁴⁰ However, there is apparently no provision for supervision by the courts.

Japan

The Japanese adopted, generally speaking, the German system of naming administrators for enemy property but with features which are peculiar to their own law. The Enemy Assets Control Law authorizes the appointment of an administrator⁴¹ of enemy property, *i.e.*, enterprises, businesses, related investments, and other assets. He is appointed by and, when necessary, relieved of his post by the Minister of Finance. He alone has the right to dispose of or take any action in regard to enemy assets, including the control and management of a juridical person. He is required to carry out his duties carefully and conscientiously and, if he fails to do so, he is liable for damages to the injured person.⁴² On the administrator's demand, any person possessing enemy assets shall deliver them to him, unless said person has a lien on the assets in question.⁴³

The sale of enemy assets may be ordered "in case of need," by the Minister of Finance to a person whom he designates at a price which he determines.⁴⁴

Although the above law apparently envisages a sole administrator of enemy assets, it has been reported that on February 10, 1942, the Minister of

³⁷ Law of June 28, 1940, art. 3. ³⁸ *Ibid.*, art. 5. ³⁹ *Ibid.*, art. 8.

⁴⁰ *Ibid.*, art. 9. ⁴¹ Law No. 99, Dec. 22, 1941, art. 1.

⁴² Imperial Ordinance No. 1179, Dec. 22, 1941, arts. 5-8.

⁴³ Regulations, Ministry of Finance Order No. 76, Dec. 23, 1942, art. 22.

⁴⁴ *Ibid.*, art. 6; Imperial Ordinance No. 1179, art. 10.

Finance designated a number of Japanese corporations and individuals, each of whom is to be responsible for specified enemy-owned business for the duration of the war.

While the Minister of Finance is apparently given exclusive jurisdiction to carry out the law, the courts of Japan are not even mentioned; an Enemy Assets Control Committee is envisaged by the law to reply to inquiries of the government in regard to important matters connected with the administration of the law.⁴⁵

The foregoing régime for enemy property in Japan itself outwardly resembles sequestration but it has been reported that in China the military authorities have confiscated certain enterprises (*e.g.*, transport and warehousing), liquidated banks and insurance and various other companies, and placed some important companies in the charge of Japanese administrators, while permitting small enterprises and stores to continue business freely.

Canada

The Canadian Secretary of State is appointed by the Consolidated Regulations of August 21, 1940, respecting trading with the enemy,⁴⁶ as Custodian, to receive, hold, preserve, and deal with such property as may be paid to or vested in him pursuant to the Regulations.⁴⁷

The Regulations themselves vest in the Custodian and subject to his control all property in Canada belonging to enemies at or subsequent to the commencement of the war, whether or not such property has been disclosed to him as required by the Regulations. The vesting order is the Regulations, which confer on the Custodian all rights of such enemies, including the power of dealing with the property in such manner as he may in his sole discretion decide. This vesting deprives the owner of all rights or remedies in respect of such property.⁴⁸

Even if the Custodian suspects that property belongs to or is being managed by or on behalf of an enemy he may apply to the Exchequer Court of Canada or order the vesting thereof in him and the court may in its order confer on the Custodian such powers for dealing with the property as it deems proper.⁴⁹

The Custodian may liquidate any property vested in him when he considers it advisable. The proceeds of the liquidation are to be deposited in a bank, or, with the approval of the Treasury Board, invested in securities which such Board approves.⁵⁰

Dividends, interest, and any other sums of money which, had a state of war not existed, would have been payable and paid to or for the benefit

⁴⁵ Enemy Assets Control Law, No. 99, Dec. 22, 1941, art. 11.

⁴⁶ Order in Council, P. C. No. 3959, Aug. 21, 1940, as amended by P. C. No. 9797, Dec. 16, 1941.

⁴⁷ *Ibid.*, par. 6 (1).

⁴⁸ *Ibid.*, pars. 21 (2) and (22).

⁴⁹ *Ibid.*, par. 23 (1).

⁵⁰ *Ibid.*, pars. 38 and 42.

of the enemy, and any money which becomes so payable after the commencement of the war, are to be paid to the Custodian. This official may hold, deposit, or invest such sums in the manner just described.⁵¹

In addition to these powers, the Secretary of State, when he is satisfied that there is reasonable grounds for suspecting that any of the envisaged acts of trading with the enemy are to be committed, may have an investigation made.⁵² If the investigation shows the expediency of having the property, trade, or business subjected to constant supervision, the Secretary of State may appoint a supervisor with specified powers.⁵³

If the situation appears somewhat more serious, as when the management of a person's property, business, or trade is likely to be so affected by the state of war as to prejudice its effective continuation, and if it is in the public interest that the said business or trade should continue to be carried on, the Secretary of State may apply to the competent court of the province to appoint a controller, and fix the duration and extent of his powers.⁵⁴

Furthermore, if the Secretary of State finds that a business is carried on in Canada wholly or mainly for the benefit of or under the control of an enemy or enemy subject, he must either (a) prohibit the carrying on of the business except under specific conditions, or have it wound up. In either case, he may appoint a controller to supervise the execution of his order.⁵⁵

Latin American Countries

The legislation of Brazil and Mexico is of particular interest in that, in each case, it was enacted in a spirit of retaliation against the sinking of ships belonging to the nationals of these countries by German submarines. Moreover, although the Mexican law was promulgated just before the Inter-American Conference on Systems of Economic and Financial Control, certain provisions of the law of that country are reflected in recommendation No. VII of the Final Act of that Conference, held in Washington June 20-July 10, 1942. After that meeting, Brazil took action against certain property of enemy nationals presumably with the intent of carrying out the recommendations of said conference.

The justification for the Brazilian legislation is found in the preamble to decree-law No. 4.166 of March 11, 1942, entitled "Dispositions on Indemnities Due for Acts of Aggression against Property of the Brazilian State and against the Life and Property of Brazilians or of Aliens Resident in Brazil." In substance the clauses of the preamble state that, in spite of Brazil's strict respect for the rules of neutrality universally accepted in international law, the Brazilian ship *Taubate* was attacked in the Mediterranean Sea by German naval forces. For such an unprovoked attack, prejudicing directly the

⁵¹ Order in Council, P. C. No. 3959, Aug. 21, 1940, as amended by P. C. No. 9797, Dec. 16, 1941, pars. 29 and 42.

⁵² *Ibid.*, par. 7.

⁵³ *Ibid.*, par. 11.

⁵⁴ *Ibid.*, par. 12.

⁵⁵ *Ibid.*, par. 15.

vital interests of Brazil, Germany is obligated to repair the damage, and Italy and Japan are jointly responsible through their alliance with Germany for the act of aggression on the Brazilian ship engaged in peaceful commerce. . . . Brazil has for more than a century offered to the nationals of those States an "intimate participation in its economy." . . . Under the conditions of modern warfare, the civil population is closely linked to the fate of a country's armies and, more than in any other period of history, constitutes a decisive element in the success of its operations of war.

In view of the foregoing, the property and rights of German, Japanese, and Italian persons, whether physical or juridical, are made to answer for the damage to the property or rights of the Brazilian State, or to the life, property, or rights of Brazilian physical or juridical persons, domiciled or resident in Brazil, or which resulted or will result from acts of aggression practiced by Germany, Japan or Italy.⁵⁶

In addition to requiring a deposit as taxes with the Bank of Brazil of from 10% to 30% of the bank deposits and obligations held by such persons, and 100% of the obligations of the Brazilian Government held by them,⁵⁷ and the prohibition of other transactions or transfers to them, the law transfers to the administration (*administracao*) of the Federal Government the property of juridical persons of public law of states which practice acts of aggression, as well as their subjects, whether physical or juridical persons, domiciled abroad and whose property is not in the possession of Brazilians.⁵⁸

Mexico

As was stated by President Manuel Avila Camacho in explanation of the Law of General Precautions Relative to the Suspension of Individual Guarantees, of June 11, 1942,⁵⁹ Mexico suspended such constitutional guarantees as might constitute an obstacle to facing rapidly and easily the situation created by the state of war declared as the result of the aggression of which that country was the victim on the part of Germany, Italy, and Japan, which sank two Mexican ships despite that country's state of non-belligerence. Among other restrictions on enemy states and their nationals, the law authorizes the occupation, in accordance with an administrative decision under a special law on the subject, of the real and personal property and rights of enemy countries and their nationals. Moreover, the properties and businesses of Mexican nationals, as well as their real or personal rights, may be occupied, subjected to intervention, or safeguarded (*ocupados, intervenidos, o asegurados*) if the President finds that they are persons interposed (*personas interpositas*) by aliens hostile to the nation, or if the said properties, businesses, or rights are susceptible of profiting by obtaining raw materials or processed articles utilizable in war industries or in any other industries indispensable for national defense.⁶⁰

⁵⁶ Decree-law No. 4,166, March 11, 1942, art. 1.

⁵⁷ *Ibid.*, art. 2.

⁵⁸ *Ibid.*, art. 11.

⁵⁹ *Diario Oficial*, June 13, 1942.

⁶⁰ *Ibid.*, art. 11, II and IV.

A law of the same date relative to properties and businesses of the enemy⁶¹ is predicated on paragraph XIII of Article 73 of the Constitution authorizing Congress to pass laws according to which "seizures on sea and land are to be declared valid or invalid" (*deben declararse buenas o malas las presas de mar y tierra*). The explanation adds that from this precept international, as well as Mexican, jurisprudence has deduced (*desprendido*) the right of a State to effect, in time of war, the confiscation of the property of enemies; and, consequently, by majority opinion, there is no doubt as to the power of a State to subject to measures of supervision and control and even to occupy enemy property in a manner that it considers convenient for the safety of the country.

Therefore, in addition to prohibiting, except by permission of the Federal Executive, any commerce with enemy States, their nationals, subjects, or interposed persons,⁶² the law authorizes the President:

- a) to occupy the property of any kind belonging or presumed to belong to an enemy country or its nationals, or in which such country or nationals have an interest, even though the property is that of a third person, provided, in the last case, that such occupation is required for the security of Mexico. The occupation may be affected in respect of all the property or the part or interest corresponding to the enemy.
- b) to designate permanent auditors in enterprises operating in national territory, whatever may be the nationality of their titular owners, when required by the interest or security of Mexico.
- c) to request or, if necessary, order the removal of officers, employees representatives, or agents of the enterprises envisaged in the foregoing paragraphs.⁶³

Property thus occupied is to be administered by national credit institutions acting as fiduciaries (*fiduciarias*) unless the President decides that the property should be sold. The sale must be made at public auction (*en publica subasta*) and in no case may the property pass to anyone other than a Mexican citizen by birth or an enterprise formed entirely of Mexican citizens by birth. However, the Executive may, at his discretion, authorize that the transfer shall not be concluded even though the best offer comes from such a citizen or enterprise, if he considers that this conforms to the interests of the country.⁶⁴

Amounts received from the debtors or administrators (after deducting the ordinary costs of the business) and from the sales envisaged above, will be deposited in the *Banco de Mexico*, which will invest them in Federal Government bonds available at the time.⁶⁵

Appeals may be presented against decisions to occupy property, and others specified in article 16, by persons having an actual and direct interest, but other claims against the authorities are to be prosecuted, adjusted, and paid

⁶¹ *Diario Oficial*, June 13, 1942, p. 6.

⁶² *Ibid.*, arts. 1-4.

⁶³ *Ibid.*, art. 7.

⁶⁴ *Ibid.*, arts. 8 and 9.

⁶⁵ *Ibid.*, art. 12.

in a manner to be determined by Congress after the cessation of the state of war.⁶⁶

CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL

From June 30 to July 10, 1942, delegates of the twenty-one American Republics met in the Hall of the Americas of the Pan American Union in Washington, D. C., to give effect to the purposes of the Conference as set forth in Resolutions V and VI of the Third Meeting of the Ministers of Foreign Affairs of the American Republics, held at Rio de Janeiro. The Final Act⁶⁷ of this Inter-American Conference on Systems of Economic and Financial Control embodies eight recommendations. The first six deal mainly with the prevention of all kinds of financial and trade relations, direct or indirect, with aggressor nations and nations dominated by them. Recommendation No. VII, entitled "Control of Business Enterprises," reads to the end "that, in accordance with the constitutional procedures of each country, all necessary measures be adopted as soon as possible, in order to *eliminate* from the commercial, agricultural, industrial and financial life of the American Republics, all influence of governments, nations, and persons within such nations which, through, natural or juridical persons or by any other means, are, in the opinion of the respective government, acting against the *political and economic independence or security* of such Republics" (present writer's italics).⁶⁸

It is to be noted that the declared purpose is to *eliminate* all influence of the governments, nations, or persons envisaged. No mention is made of the countries with which war has been declared, but there is used an all-embracing concept of acts "against the political and economic independence or security of such Republics" . . . "in the opinion of the respective government."

The measures recommended for adoption include, first, the forced transfer or total liquidation of the business, properties, and rights of any real or juridical persons previously mentioned, whatever their nationality; however, if this should not be desirable in the opinion of the government of each country, they are to be the object of blocking, occupation, or intervention in order to give effect to the purposes of the recommendation.

The forced transfer or any other form of alienation of said properties and rights can only be made to nationals of the respective country or to juridical persons formed by them. Furthermore, in establishing the conditions of such acquisitions or in selecting the buyers, the government of the country in which the transaction takes place is not to permit any direct or indirect participation by any real or juridical person whose activities are deemed contrary to the principles set forth in the introduction to the recommendation.⁶⁹

⁶⁶ *Diario Oficial*, June 13, 1942, art. 18.

⁶⁷ Pan American Union, Congress and Conference Series, No. 39, 1942.

⁶⁸ *Ibid.*, Recommendation No. VII, par. 1.

⁶⁹ *Ibid.*, par. 1 (a) and (e).

Other paragraphs call for the removal of officers and employees of any of the real or juridical persons envisaged, and the cancellation of the contracts of such persons, including contracts and concessions for the exploitation of natural resources and public services.⁷⁰

Proceeds from the sale of transferred properties and rights and profits accruing from intervened or supervised businesses, and funds derived from total liquidation, are to be effectively blocked in accordance with the regulations pertaining to blocking.⁷¹

Exchange of information on the measures adopted pursuant to the recommendation is also required.⁷²

The system of occupation in the Mexican law and the requirement therein as to sale to nationals or juridical persons composed of nationals are evidently envisaged in the recommendation. The measure of "intervention" envisaged evidently corresponds to a practice followed in Guatemala, and perhaps in other countries, under which an intervener is named by a bank to take over a plantation or other property which cannot meet its loans.

LATER BRAZILIAN DECREES AND LAWS

Subsequent to the Washington Conference the Brazilian Government, on August 25, 1942, published two decree-laws, predicated upon the recognition that a state of belligerency existed with Germany and Italy. One of them rescinded contracts between the Brazilian Government or Lloyd Brasileiro and German or Italian official or private organizations for the purchase, sale and lease of vessels of German nationality, and such vessels were incorporated in the national patrimony. The obligations assumed by the State or by the company named, under the contracts, were declared null and void.⁷³ The other decree-law cancelled the charters under which specified German and Italian banks operated and directed the Minister of State for Financial Affairs to appoint agents to proceed with their liquidation.⁷⁴

On September 1, 1942, a decree-law was published declaring a state of war throughout the national territory⁷⁵ and on the same day another decree-law⁷⁶ was published which cancelled the charters of German and Italian insurance companies with autonomous establishments or representatives, and directed the Institute of Reinsurance, as mandatary of the Union, to arrange for their liquidation.

In the case of the liquidation of the insurance companies as well as the banks, properties and rights or claims attributable on liquidation to the governments, corporations or individuals of Germany, Japan, or Italy were to be incorporated in the national patrimony.

⁷⁰ Pan American Union, Congress and Conference Series, No. 39, 1942. Recommendation No. VII, par. 1 (b) and (c).

⁷¹ *Ibid.*, par. 1 (d).

⁷² *Ibid.*, par. 3.

⁷³ Decree-law No. 4.611, August 24, 1942, *Diario Oficial*, Aug. 25, 1942.

⁷⁴ Decree-law No. 4.612, Aug. 24, 1942, *ibid.*

⁷⁵ Decree No. 10.358, Aug. 31, 1942, *ibid.*, Sept. 1, 1942.

⁷⁶ Decree-law No. 4.636, Aug. 31, 1942, *ibid.*

While the cancellation of the contracts or charters mentioned above was in line with the Conference recommendation No. VII, the incorporation into the national patrimony of property belonging to enemy governments, corporations or nationals is apparently a confiscatory measure which was not expressly foreseen.

COMPARISON BETWEEN FOREIGN AND UNITED STATES LAWS

It is to be noted that the other belligerents have in general dealt with the treatment of enemies and their property in one or more basic laws and a few related decrees, regulations, or orders. The United States has, on the contrary, no comprehensive legislation. Instead, our government has resurrected and amended the Trading with the Enemy Act of 1917 and issued a wide range of Proclamations and Executive Orders, such as the "Freezing Control" regulations in Executive Order No. 8389, which is administered by the Treasury Department, and the Executive Order No. 9095 of March 11, 1942,⁷⁷ which reconstituted the office of the Alien Property Custodian for World War II under the President's direct control within the Office for Emergency Management. This order vests in the Alien Property Custodian all powers conferred upon the President by sections 3 (a) and 5 (b) of the Trading with the Enemy Act, except the freezing control powers which remain in the Treasury Department.

The authority in charge of the administration of the law in other countries differs from country to country. For example, in Great Britain it is the Board of Trade; in Germany, it is the Reich Minister of Justice and his appointed Reich Commissioner, in conjunction with the provincial courts of appeal, for the régime of administration of enemy property, and the curatorship courts for that of curatorship-in-absence; in Italy, the Minister of Corporations, in accord with the Minister of Finance; in Japan, the Minister of Finance; in Canada, the Secretary of State. In the United States, the authority is granted to the President himself who has, as shown above, delegated certain powers to the Secretary of the Treasury and others to the Alien Property Custodian.

Most of the laws provide for a régime of conservation of enemy property which conforms to what is commonly termed in international law "sequestration." Thus in Great Britain Custodians are appointed for England, Scotland, and Northern Ireland to receive and preserve enemy property, and an order vesting property in a Custodian has the same purport as one issued under the Trustee Act 1923.⁷⁸ Under German law, the administrator is to assure the protection and maintenance of the property and exercise his functions with the care of an ordinary administrator,⁷⁹ and a curator-in-absence apparently has the same responsibilities as a civil law guardian.⁸⁰ In Italy,

⁷⁷ Amended by Executive Order No. 9193 of July 7, 1942.

⁷⁸ Board of Trade Orders under sec. 7 of the Trading with the Enemy Act, 1939, No. 1193, as amended.

⁷⁹ Decree of Jan. 15, 1940, arts. 12 and 15, *Rgbl.*, Jan. 20, 1940, Pt. 1, No. 16, p. 191.

⁸⁰ Decree of Oct. 11, 1939, *Rgbl.*, Oct. 16, 1939, Pt. 1, No. 202, p. 2026.

the sequestrator represents the enterprise for all purposes but, to perform more than ordinary acts of management, he must obtain the authorization of the Minister of Corporations, in accord with the Minister of Finance, and render quarterly accounts to them.⁸¹ In Japan, while the law authorizes the Minister of Finance to appoint an administrator who must carry out his duties carefully and conscientiously,⁸² in practice, individuals or banks are reported to have been placed in charge of particular businesses.

The Canadian law appoints the Secretary of State as Custodian to receive, hold, preserve and deal with enemy property as may be paid to or vested in him.⁸³ He may deal with such property in such manner as he may in his sole discretion decide.⁸⁴

Under the Mexican régime of occupation, the property of business is to be administered through national credit institutions acting as fiduciaries⁸⁵ and, in practice, an individual is appointed to supervise the management of a particular business.

Although originally under the Trading with the Enemy Act, 1917, of the United States, the Alien Property Custodian was intended primarily to conserve enemy property as a common-law trustee, and to sell it only when necessary to prevent waste, an amendment of 1918⁸⁶ provided that, if the President determined that the public interest so required, the Custodian was given power to make any disposition of the property seized, "by sale or otherwise—in like manner as though he were the absolute owner thereof."⁸⁷

Under Executive Order No. 9095⁸⁸ the duties of the Alien Property Custodian consist primarily in the management of alien-owned businesses in the United States. The language employed in the Alien Property Custodian's first vesting order of March 25, 1942, is significant: "The listed properties are hereby vested in the Alien Property Custodian to be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for *the benefit of the United States*" (present writer's italics).

Pending further determination of the Alien Property Custodian, such property, and any and all of the proceeds thereof, are to be held in an appropriate special account or accounts. The following important proviso is added:

This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that *compensation will not be paid* in lieu thereof, if and when it should be

⁸¹ Law of June 28, 1940, arts. 4 and 5.

⁸² Law No. 99, Dec. 22, 1941, art. 1; Imperial Ordinance No. 1179, Dec. 22, 1941, arts. 5-8.

⁸³ Order in Council, P.C. No. 3959, Consolidated Regulations of Aug. 21, 1940, par. 6 (1).

⁸⁴ *Ibid.*, par. 21 (2), 22.

⁸⁵ Law of June 11, 1942, art. 8, *Diario Oficial*, June 13, 1942.

⁸⁶ Act of Mar. 28, 1918, Chap. 28, sec. 1, 40 Stat. 460.

⁸⁷ *U. S. v. Chemical Foundation (CCA-3)*, 1925, 5 Fed. 2nd, 1941, affirming (*D. C. Dela.* 1924) 294 Fed. 300, and modified (1926) 47 Sup. Ct. 1, 272 U. S. 1, 71 L. Ed. 131.

⁸⁸ Order of Mar. 11, 1942, as amended by Executive Order No. 9193 of July 7, 1942.

determined that such return should be made or *such compensation should be paid* (present writer's italics).⁸⁹

In other words, although the property is in general to be dealt with for the benefit of the United States the possibility of returning the property or the proceeds thereof is envisaged and this suggests sequestration.

The equivocal clause authorizing the Custodian to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such compensation should be paid, bespeaks the possibility of confiscation.

When the Secretary of the Treasury issued the original vesting order of February 16, 1942, before the office of the Alien Property Custodian was reconstituted, the press release concluded with the statement that "the question of the ultimate disposition of the property sequestered is being left open." As the above-quoted language was in the original order, this explanation presumably still obtains. Although initially the régime was intended to be one of sequestration, the foregoing statements clearly indicate that the Executive wishes to remain free to dispose of the property and its proceeds in such manner as is held appropriate when hostilities cease.

The English law charges the Custodian to preserve enemy property in contemplation of an arrangement to be made at the conclusion of peace and thereby also leaves the question open. The régimes of administrations or custodianship or occupation in other countries imply an eventual return of the property, but the respective laws contain no commitments.

Other United States measures, which were carried out by the Treasury, involve the blocking or holding of enemy-owned funds at least for the duration of the war. Freezing control was initiated on April 10, 1940, when Germany invaded Norway and Denmark, and the primary purpose of Executive Order No. 8389 was to prohibit transactions involving Norwegian and Danish property within the United States, except as authorized by the Secretary of the Treasury. As other countries were invaded or dominated by the Axis, the control was extended until it covered over seven billion dollars of assets and the transactions of more than thirty-five countries, including all continental Europe (except Turkey), China, Japan, and the countries it has occupied, and the nationals of all such countries.

The control of foreign funds was begun as a measure to protect the assets within the United States of invaded countries to prevent their falling into the hands of the invaders and also to protect American banks and other institutions from possible adverse claims. As the control followed the spreading of the war, the Treasury became aware of its value as a weapon of economic warfare and administered it with a view to sever completely all financial and commercial intercourse and communications between the United States and the Axis and Axis-dominated countries, or with other countries in or out of the Western Hemisphere, which, directly or indirectly,

⁸⁹ For example, 8 F. R. 3647-3648.

would benefit the Axis, as well as the elimination of all financial and commercial activities engaged in by real or juridical persons within the United States whose influence or activity is deemed inimical to the security of the Western Hemisphere.

In pursuing the last-mentioned objective about 3,000 enterprises in the United States have been blocked, *i.e.*, permitted to operate under license. Such enterprises have been required to give full information as to their business relationships. Some have been subjected to strict supervision under government representatives, known as interventors, and required to dismiss certain executives and employees. About 500 other enterprises have been forced to liquidate, where they were not essential to the war effort and their continued operation was not deemed in the public interest. The funds remaining after paying off the creditors are placed in blocked accounts.⁹⁰

The laws of other countries similarly envisage the possibility of liquidation or sale of the property or business of enemies and, presumably, the proceeds of the liquidation or sale, as well as the earnings or yield of the property or business if preserved, are to be subject to the same treatment as that accorded the property.

However, there are two important instances where the property or proceeds are evidently not to be returned to the former owners. The first in point of time is the incorporation in the national patrimony of Brazil of the ships and the proceeds of the liquidation of certain banks and insurance companies in Brazil belonging to the citizens or corporations of Germany, Italy, and Japan.⁹¹ The second is the American Alien Property Custodian's seizure of enemy patents which are to be held as a "permanent possession of the American people."⁹² The incorporation of private property in the national patrimony of Brazil was apparently regarded as indemnification of the nation for the sinking of a ship and aggression against the nation and its citizens. The seizure of the enemy-owned patents was justified as a means of preventing "their use in the furtherance of any monopoly or cartel system or any similar exploitation contrary to the public interest."⁹³

However, under international law the taking of property without adequate compensation constitutes confiscation, and the question is posed whether confiscation of enemy property either as a means of indemnification or to safeguard the public interest is to be supported as a sound principle of international law.

QUESTIONS AND FACTORS TO BE CONSIDERED

In arriving at an impartial and unprejudiced conclusion on these questions we must take into consideration the fact that the basic concepts and nature

⁹⁰ United States, Treasury Department, Administration of Wartime Financial and Property Controls of the United States Government, December, 1942.

⁹¹ Decree-law No. 4.611, Aug. 24, 1942, *Diario Oficial*, Aug. 25, 1942; Decree-law No. 4.612, Aug. 24, 1942, *ibid.*; Decree-law No. 4.636, Aug. 31, 1942, *ibid.*, Sept. 1, 1942.

⁹² New York Times, Dec. 20, 1942, p. 20, article by John MacCormac. ⁹³ *Ibid.*

of warfare have changed. In the days of Grotius and Vattel, and well into the 19th century, as Frederick the Great is reported to have said, war was the affair of princes, and the civil populations were to be disturbed as little as possible. Trade was carried on for the most part by relatively small merchants who, even though citizens of an enemy country, were often purveyors of food or useful merchandise. The country ran little risk in giving them nine months to wind up their affairs and depart as was done in our treaty with Prussia in 1799.⁹⁴

Since then war has become a war of peoples; the total war of today involves all the property of the individuals and corporations of a nation as well as the government itself. There appears to be little if any doubt that prior to the outbreak of this war the Nazi Government acted through or with the big trusts of Germany, such as the I. G. Farbenindustrie, to gain competitive advantages for the German State as compared with other countries in what is termed economic warfare. The utilization of commercial establishments belonging to an American corporation controlled by such powerful German interests for espionage and other anti-American activities is brought out in the report of the Treasury Department of December 1942.⁹⁵

In the present war the military conquest of neighboring countries was followed by the invasion of the financial and technical experts of the big German banks and trusts whose purpose was to acquire and exercise control of many, if not all, of the principal financial and industrial companies of Europe. The acquisitions are reported to have been legal in form, just as the laws of Germany on the administration of enemy property have been drafted scrupulously in accordance with international law.

Nevertheless, it must not be forgotten that Germany invaded these countries by force of arms and acquired these properties by what may be termed duress, to say the least, however legal the form. Furthermore, the application of the German system of economy involves, among other things, a general control of banking, industry and trade, in order to render those activities subservient to German requirements. In carrying out this policy throughout occupied Europe, Germany has, in many cases, confiscated property without compensation, has utilized funds of the occupied countries, such as "free sums" in clearing accounts, and the excess of amounts collected for "occupation costs" over the actual costs, to acquire control of local businesses. As a result, the Deutsche Bank, the Dresdner Bank, and a few other German banks have acquired control of banking institutions directly or indirectly over the whole of Europe. Moreover, certain industrial "Konzerns," such as the Reichswerke Hermann Göring, in the field of mines and metallurgy, machinery and armament production, and inland waterway navigation, the I. G. Farbenindustrie primarily in the field of chemicals,

⁹⁴ Art. XXIII; Malloy, *Treaties, Conventions, etc.*, p. 1494.

⁹⁵ United States, Treasury Department, *Administration of Wartime Financial and Property Controls of the United States Government, Foreign Funds Control*, December, 1942.

and the Kontinentale Öl.A.G. in the field of crude oil, have gained control or ownership of key enterprises in the same area.⁹⁶

Unless these acquisitions are nullified Germany will come out of the war with a strongly centralized ownership or control of a large part of the production of Europe which has been acquired with the purpose of dominating world commerce when military hostilities cease. How much of this can in fact as well as in law be nullified remains to be seen.

It seems self-evident that such "Konzerns" are intimately linked with the Nazi Government. Should property belonging to any such organizations or their members be returned after the war or compensation in lieu thereof be given—in either case strengthening the very interests which are in part responsible for the loss of life and property of citizens of the United Nations?

While remaining unalterably opposed in principle to the confiscation of private property in time of peace or war, should we recognize an exception in the case where the property within our territory belongs to individuals or companies which are known to have coöperated with or acted as instrumentalities of an enemy government in carrying out acts of economic or military warfare?

Should the exception be broadened to the point of sanctioning confiscation as a means of indemnifying a nation and its citizens against loss of life or property resulting from acts of aggression, or to prevent the use of enemy-owned property in a manner contrary to the public interest?

Such questions are presented as examples of the ones that should be considered by students of international law in the light of the basically changed conditions of current warfare. In answering them, we should keep in mind that after the war American owners of property in enemy or enemy-occupied countries will expect to recover their property, or adequate compensation therefor, if it has been sold, liquidated or damaged. Moreover, we should seek to find solutions to the problems involved which will serve to restore international commerce as quickly as possible and lay a firm foundation for the resumption of productive investments abroad.

⁹⁶ The Penetration of German Capital into Europe, being No. 5 of a Series of Reports; Inter-Allied Information Committee (London), 1942.

EDITORIAL COMMENT

CHANGES IN OFFICERS OF THE SOCIETY AND JOURNAL

At the annual meeting of the Society held on April 30 last, the undersigned most regretfully felt compelled to inform the Executive Council that he would be unable to accept reelection as Secretary of the Society and Managing Editor of the JOURNAL. After thirty-four years of active work with the JOURNAL, first as assistant to Dr. James Brown Scott and later as his successor, he was as reluctant to resign as the Executive Council seemed reluctant to accept the resignation. It was, however, a matter of necessity principally because of the exacting duties of the offices of Secretary of the Carnegie Endowment for International Peace and Director of its Division of International Law which have in recent years devolved upon the undersigned.

A few days later Mr. George Grafton Wilson resigned as Editor-in-Chief of the JOURNAL, which position he has held since 1924.

These three vacancies were filled at a meeting of the Executive Council held in Washington on July 21, 1943, after considering the report of a special committee appointed to inquire into the matter. Mr. James Oliver Murdock was elected Secretary of the Society and Professor Pitman B. Potter, of Oberlin College, was elected Managing Editor of the JOURNAL. The Editorial Office of the JOURNAL will be located at Oberlin, Ohio, beginning in January, 1944. At the insistent urging of the Executive Council the undersigned agreed to accept the position of Editor-in-Chief of the JOURNAL for a limited term.

Since the Society was founded in 1906 and the JOURNAL started publication in 1907 the knowledge of international law has expanded beyond the dreams of the founders. The record of this expansion is faithfully recorded quarter by quarter in the regular issues of the JOURNAL and in the Proceedings of the uninterrupted annual meetings of the Society. Progress toward the second object for which the Society was founded, namely, the maintenance of international relations on the basis of law and justice, has been interrupted by two world wars, but the same period has witnessed the establishment of the first Permanent Court of International Justice and other institutions intended to promote law and justice in international relations. As the present world-wide struggle reaches its climax, it is universally acknowledged by those who are free to think that only through the advancement and effectiveness of international law is there hope for a peaceful world in the future.

After serving so long and so well in the period of the transformation of international law from a cloistered science to a present position where a knowledge of it is within the reach of every student and practitioner of international law, as well as of many in the general fields of political science and govern-

ment, the Society and JOURNAL now have a period of still greater usefulness and opportunity ahead of them. The undersigned accordingly urges the fullest coöperation of the members and readers of the JOURNAL with the new officers who are succeeding him. His retirement from these positions does not indicate a lack of continuing interest or of willingness to help; he hopes to have better opportunity to promote the welfare of the Society and JOURNAL outside of the administrative offices with which he has been so long associated.

GEORGE A. FINCH,
Editor-in-Chief

THE FUTURE OF INTERNATIONAL LAW

Anyone who, from his knowledge of international law and his study of international society, believes that law has important and even indispensable functions to perform on behalf of the international community must be seriously perturbed today concerning the fate of international law in the immediate future. The facile stereotype to the effect that there is no longer any international law left, it having all been destroyed by the war, is not heard today quite as frequently as it was twenty-five years ago but that may be because the remark is regarded as too obvious and even superfluous at this late date. In any event the facts speak for themselves and the situation is clearly a serious one which calls urgently for attention and careful thought as to what should be done.

Without stressing unduly either the ultimate soundness or utility of the classification, we may assume that international law is of two major types, customary and statutory. The former, based on practice, is largely unwritten and, in the main, is uncoded. The second, the product of formal agreement, is written, though also uncoded, and treats, in point of content, both of matters of international organization and procedure—international constitutional law—and also of the rights and obligations of states as such, being similar at this point to the customary law. What is the situation today in respect to each of these branches of the law and what needs to be done in the post-war period which will soon be upon us? What of the problem of administration and enforcement of the law?

Common international law on the rights and duties of states in time of peace has not changed very much in the past twenty-five years. The movement for its codification, initiated with such hope and confidence twenty or thirty years ago, has almost come to a standstill, although much greater progress has been made on a limited or regional scale in the Western Hemisphere than was made elsewhere. The law itself, as always, calls for further—for unending—development. The codification effort must be resumed on a universal scale, with due attention to the difficulties encountered earlier. The efforts made in the Western Hemisphere must be given their proper place in the world picture and the universal international law

of peace—in some ways more basic than all of the other forms—must be assured a firm and clear position in the eyes of men and governments alike.

The law of war and neutrality is in chaos. It is not even possible to aver that the law is still what it was in July, 1914, subsequent violations having had no effect to change the law. The variations in practice in the years 1914–1918 and 1939–1943, not to mention other, smaller, passages in the same pattern, have been so great, and the alterations in social and technical conditions of international life so extensive, that it seems impossible both logically and practically to take any such position. In addition, the nations most unwisely neglected and even refused to do anything in the 1920's and 1930's to correct this state of affairs.

The situation must be taken in hand and remedied. It is utterly out of the question to be sure that war and neutrality are going to be completely abolished. Even if they were, and international police action were to take their place, neutrality being entirely eliminated, law governing such operations must be devised and developed. Probably the law governing international police action must be separate and different from the law on the conduct of hostilities and the latter be preserved and revised and recodified for cases where applicable.

International statute law dealing with the rights and duties of states apart from international institutions and procedure expanded greatly in volume in the years 1919–1939, after beginnings of considerable importance in the fifty years or so prior to 1914. To this process—and also to its product—the name “international legislation” was given, although in point of substance that label might logically be applied to other forms of international-law-making activity, and, in point of form, that activity fell short, for the most part, of the process of “legislation” as practiced in the individual state. No great effort was made to preserve order in this field or codify the results and the instruments embodying the activity in question were simply gathered and reprinted in various treaty collections, both official and unofficial.

There is no need to bespeak a continuation of international legislation; it will almost certainly be resumed and expanded in the nature of things and this must be regarded as normal and desirable. So for the scope of subjects treated—in contrast to the old law of peace—they are already as varied as human life and will continue to be so. Changes in the procedure for international legislation are needed, in its formulation (the question of the entities made parties to the law), and in its enforcement, but these are problems of international organization itself.

In the latter field we now have many international constitutions, usually though not invariably in the form of conventions. Constitutional and regulatory or international legislative problems are, of course, intermingled in the same instrument. Finally, we have much international constitutional law in codes of rules of organization and procedure adopted within inter-

national institutions themselves, such as the Rules of Procedure of the League Assembly.

Here also no great argument needs to be made in favor of continuation and development of this branch of international law. In spite of curious reactionary gestures noticeable in unexpected quarters from time to time the inevitable and salutary process of improved international organization may be expected to continue. There is, here as in the field of international legislation, something like a saturation point to be anticipated somewhere ahead but this can be allowed to take care of itself. What is badly needed, however, is a check upon the incredibly bad drafting too often encountered in international constitutional documents today. Then come the improvements in procedure already alluded to: increased use of administrative advice in preparatory work, of action by majority or qualified majority, of coördination between independent agencies. Extension of international legislative and administrative—including judicial—action to deal with international organizations, private corporations, and individuals (as well as states) is also to be anticipated. Improved provision for administration of the law, hitherto badly neglected, and even enforcement of the law if need be, must be contemplated.

At this point, however, we pass over into substantive problems of the art of international organization and government which lie beyond the strict limits of the science of the law. Students of the law must be aware of these problems—political, economic, psychological, and other—in order to understand their own science, and could probably be helpful in their solution. Thirty years ago these problems, so long neglected, stood more in need of attention than the law itself. Today, however, the first task of the student of international law would seem to consist of the more strictly legal or juridical matters mentioned earlier.

PITMAN B. POTTER

COLLECTIVE NATURALIZATION AFTER CONQUEST—ITS INAPPLICABILITY
TO NON-RESIDENTS

A series of recent decisions by the United States Court of Appeals for the Second Circuit dealt with the meaning of the term "native, citizen, denizen or subject" of Germany, under the Alien Act of July 6, 1798, and at the same time clarified some of the international legal conditions attached to collective naturalization. In the most important of three decisions handed down on August 18, 1943, the Court deals with the effect of the annexation of conquered territory on the citizenship of those who were nationals of the conquered country but not domiciled therein at the time of annexation or any time thereafter.¹ The relator was apprehended by the F.B.I. on December 9, 1941, as an alleged German enemy alien, pursuant to the Act

¹ United States *ex rel.* Paul Schwarzkopf *v.* Uhl, District Director of Immigration.

of July 6, 1798, as amended,² and the President's proclamation of December 8, 1941,³ issued thereunder. To test the legality of his detention the relator sued out a writ of habeas corpus, contending that as a matter of law he was not a "native, citizen, denizen or subject" of Germany, within the meaning of the Act of 1798.

The relator was born in 1886 in Prague, Bohemia, then a part of Austria-Hungary. By the Treaty of St. Germain of 1919, he became a Czechoslovakian. In 1925, he became by naturalization a citizen of Germany. In 1927 he moved to Austria and in 1933 became a naturalized Austrian, his German citizenship, it was admitted, being thereby automatically terminated. In 1936 he arrived in the United States for permanent residence as a quota immigrant under the Czechoslovakian quota. When Hitler's forces invaded Austria in March, 1938, the relator was resident in the United States. In June 1938 he declared his intention of becoming a United States citizen. His application for final naturalization, made in September, 1941, was pending at the time of his arrest. It also appears that under the law of July 10, 1935, the Police President of Berlin cancelled the relator's German citizenship, and that on October 7, 1937, the German consul at Innsbruck notified him of the cancellation and took up his German passport. Again, under the so-called Nuremberg laws of 1935 and 1938, a German "Executive Order" was issued November 25, 1941, depriving departing persons in the relator's class of German citizenship and confiscating their property.

The United States District Attorney, in support of his contention that the relator was a German citizen, took the position that the Anschluss in March, 1938, and the German law of July 3, 1938, making all Austrian citizens German citizens, must be recognized by our courts; that the State Department had identified the relator as a German citizen in a letter directed to the Attorney General on May 9, 1942, and that the Commissioner of Immigration and Naturalization adopted the policy of the Department of State; that whereas Austrians and Italians were exempt from registration as enemy aliens, unnaturalized Germans were not; that the relator was not privileged to elect any other citizenship or reject German citizenship under the law of July 3, 1938; that since Austria had ceased to exist, there was no individual option to elect between his old Austrian and new German nationality;⁴ that the notice of cancellation of his German citizenship in 1937 was

² 50 U.S.C.A. § 21. This section reads:

Section 21. Restraint, regulation, and removal. Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

³ 6 Fed. Reg. 6323.

⁴ As in *United States v. Repentigny*, 5 Wall. 211 (U. S. 1866); *Jones v. McMasters*, 20 How. 8 (U. S. 1857); *Boyd v. Thayer*, 143 U. S. 135 (1892).

ineffective, because by 1933 he had ceased, by naturalization in Austria, to be a German citizen, a fact which the German authorities did not know; that the notice of cancellation in 1937 was issued after expiration of the original law of 1933, a fact which the relator denied; and that the German decree of November, 1941, depriving relator of his citizenship and confiscating his Austrian or German property, is contrary to United States public policy and not entitled to recognition.

On behalf of the relator it was argued that the German decree of July 3, 1938,—leaving aside the revocations of his German citizenship—did not apply to the relator; that he was not an enemy alien, because the United States had not recognized the annexation of Austria by Germany; that the Kellogg Pact would be violated by such recognition; that the relator was still an Austrian, but not a German, citizen in 1941 because a change of sovereignty does not affect the citizenship of nationals who have removed permanently from conquered territory; that the assent of the person whose nationality is to be changed, expressly or by implication, is necessary under American and international law;⁵ that before the outbreak of war in the United States in 1941 Austrians were not required to register as Germans, but as Austrians, which was true even after 1941, except for those voluntarily acquiring German or enemy citizenship; that American judicial practice, supported by authorities on international law, took the view that only the "inhabitants" of or those who "remain" in a country can be deemed to have assented to have their nationality changed by annexation. On behalf of Austrian Action, Inc., Mr. John W. Davis filed a brief as *amicus curiae*, disputing the position of the United States Attorney which gave legal validity or "recognition" to the Anschluss of March 13, 1938, and the German nationality decree of July 3, 1938, based thereon.

After dismissing as irrelevant the issues of recognition—there being conflicting evidence on the question whether the United States authorities did or did not recognize the annexation of Austria by Germany—the Court, in an opinion by Judge Swan, concentrates attention on the one point whether the relator, having left Austria long before the Anschluss, can be deemed a German citizen, either because he had not lost that citizenship or because, having lost it, he reacquired it by the decree of July 3, 1938. Concluding that the municipal law of Germany as well as the rules of international law are determinative of the question of the relator's German citizenship, the Court holds that in the light of international law Germany could impose German citizenship by annexation (collective naturalization) only upon those who were "inhabitants" of Austria in 1938. The American practice

⁵ Early decisions to this effect are: *McIlvaine v. Coxe's Lessee*, 2 Cranch 280, 4 Cranch 209 (U. S. 1805); *Respublica v. Chapman*, 1 Dall. 53 (U. S. 1781); *Inglis v. Trustees of Sailor's Snug Harbour*, 3 Pet. 99, 122, 123 (U. S. 1830); *Kent, Commentaries*, Vol. II, §§ 40, 41.

conceding a personal election in the matter is thus regarded as reflecting a rule of international law.⁶

Oppenheim⁷ has no doubt that doctrine and practice agree that enemy subjects domiciled on the annexed territory who remain there after annexation become *ipso facto* subjects of the conquering state. But as to those subjects who are domiciled abroad and do not return, he states there is some dispute. He says that some writers maintain that even the absent have their allegiance transferred, whereas others, whose views Oppenheim shares, deny it. But even Rivier,⁸ the only writer cited in support of the former view, is far from endorsing the position that the absent are under all circumstances collectively naturalized. Distinguishing voluntary cession from conquest, and asserting, without citing cases or authority, that not even the right of option or emigration need be granted, and that subjects who emigrate without permission are still subjects of the conqueror, he manifestly does not focus attention on the status of those who left the territory long before the annexation; but even as to those who remain, he says that the modern tendencies are against any automatic transfer of allegiance, since these are designed to free man from the soil, manifested in the opportunity to emigrate and the introduction of the privilege of option; that the old practice was against public policy, prolonging war into peace and arousing just resentments likely to be vindicated by resistance.

Halleck,⁹ after concluding that the right of election is essential and that "domicile" in or out of the territory is evidence of election, calls attention to the notable case of Count Platen-Hallermund, Minister of Foreign Affairs in the Cabinet of King George of Hanover, who left Hanover for Vienna with the King before the annexation of Hanover to Prussia in 1866. In 1868, while in Vienna, the Count was tried for high treason—for alleged conspiracy to undo the annexation—by the Prussian Kammergericht at Berlin, which held him to have become a Prussian subject by the annexation and punished him *in contumaciam*.¹⁰ This decision seems to have met gen-

⁶ Said Marshall, J. in *American Ins. Co. v. 356 Bales of Cotton* (Canter), 1 Pet. 511, 542 (U. S. 1828): "On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved. . . . The same Act which transfers their country, transfers the allegiance of those who *remain* in it." (Italics supplied.) Halleck adds that "the allegiance of those who *do not remain*, of course, is not so transferred with the territory." (International Law, 4th ed., Vol. II, p. 509). The American diplomatic practice is in accord with this view. See Moore's *Digest of International Law*, §§ 379, 380, and Van Dyne, *Naturalization*, pp. 275-276.

⁷ International Law, 5th ed., by Lauterpacht, London, 1937, Vol. I, § 240.

⁸ *Droit International*, Vol. II, p. 438.

⁹ International Law, 4th ed., (London 1908), Vol. II, p. 506 *et seq.*, at p. 511.

¹⁰ See also *Brown v. United States*, 5 Ct. Cl. 571, 573 (1869), in which the same annexation was involved. Brown was a native of Hanover, domiciled in Savannah, Georgia, since 1860. To maintain his suit in the Court of Claims, he had to prove that he was a citizen of

eral criticism as erroneous. The most recent critic is Professor Schoenborn, an authority on the subject of state succession.¹¹ He argues that since the Count was outside the jurisdiction of Prussia at the time of annexation and never returned, Prussian naturalization could not be imposed upon him. This is also the view of the earlier writers,¹² especially of Professors Zachariae of Göttingen and Neumann of Vienna, who contend in learned legal opinions on the case¹³ that the mere fact of conquest or forcible annexation did not create the relation of sovereign and subject between conqueror and conquered, that there must be either an express or "tacit submission" in order to change personal status, an election or intention which might be evidenced by a voluntary continued residence in the annexed territory but is negatived by a voluntary departure before the annexation. They hold, as American practice from the beginning has affirmed—in contradistinction to the irrelevancy of individual assent to the annexation of territory¹⁴—, that the individual expression of will is an inherent part of the relation, the Count's departure before annexation indicating plainly, therefore, that he never became a subject of Prussia.

The Circuit Court of Appeals would therefore seem to have had ample support for its view that the right of election in such cases is not only an inherent part of American law but mirrors in this respect a sound rule of international law. The fact that there is no Austrian Government whose nationality can be elected does not militate against the fact that the relator may by departure from the territory and other acts repudiate the sovereignty of the German conqueror and prefer to remain "stateless" until he can acquire another citizenship, that of the United States in this case. This is quite apart from the fact that it would be a strange judgment for a United States court to find that the relator was a German citizen, when the German Government had on at least two occasions repudiated the relation. Each country determines for itself who are its nationals, subject to certain limitations on expansive claims to nationality imposed by international law. But

a government which permits American citizens to bring suit against it. He offered evidence that Prussia accorded such a privilege. Nott, J. remarked that merger of territory carries even absent subjects with it, since the tie which carries them to the new state is not bodily presence but allegiance. This is about the only American authority that believes election or assent, express or tacit, is not material. But Brown was asserting that he was a subject of Prussia, and Prussia (or the United States) was not seeking to force on him an allegiance which he repudiated, as in the Schwarzkopf case.

¹¹ In Strupp, *Wörterbuch des Völkerrechts*, Vol. II, p. 271 (1927). Cf. Kunz, J., *Die völkerrechtliche Option*, Breslau, 1925, Vol. I, pp. 100-110.

¹² Holtzendorff in *Handbuch des Völkerrechts*, Berlin, 1885, Vol. II, pp. 42-43. Stoerk, *Option und Plebiscit, bei Eroberungen und Gebietscessionen*, Leipzig, 1879, pp. 150-155.

¹³ *Über den Einfluss der Einverleibungen auf das Unterthanenverhältniss*, *Allgemeine Deutsche Strafrechtszeitung*, Vol. VIII, pp. 304-320 (1868), opinions summarized by Halleck, *op. cit.* Vol. II, p. 510.

¹⁴ Cf. Hula, "National Self-Determination Reconsidered," in *Social Research*, Vol. 10, Feb. 1943, pp. 1-21.

the American statute of 1798, passed to authorize apprehension of those who are likely by reason of birth or allegiance to favor and help the hostile nation of the moment and endanger public safety if left at large, must be construed, said the Court, correctly, in the light of contemporary American experience during the post-Revolutionary period, and that the right of election between the old sovereign and the new was then deemed inherent in collective naturalization. It was in this sense that the word "citizen" was used in the statute. The record in the instant case shows the relator's repudiation of German citizenship by word and deed, and that Government's disavowal of any claim to his citizenship.

In another case, decided the same day,¹⁵ the Circuit Court of Appeals had occasion, while remanding the case for further testimony, to indicate its views on what might have been meant by the word "denizen" in the Act of 1798. The alien in question was born in 1900 in Bosnia, then a part of Austria-Hungary, but in 1919, on the break-up, became a citizen of Yugoslavia, and has so remained. In 1922 he went to Austria and continued to live there until June 1939, when he was admitted to the United States as a non-quota immigrant. He carried a foreigner's pass issued by Germany in 1938 which describes him as stateless. He was picked up and charged with being a "denizen" of Germany, by reason, presumably, of his long residence in Austria. Blackstone says that a denizen is an alien born, who has obtained royal letters patent to make him an English subject, with a status somewhere between an alien and a natural born subject; he may take lands by purchase or devise, which an alien may not; but he cannot take by inheritance. Congress must have used the word in this sense. Congress doubtless meant to describe some relation to the enemy state, neither citizenship, nor alienage; Judge Swan says that "merely former residence by him in the enemy country cannot suffice; nor can former domicile." It would seem difficult to apply an ancient concept, indigenous to England, to nationals or residents of other states.

In a third decision¹⁶ the petitioner was born in Vienna of Austrian parents. He went to France in 1919, intending never to return, and he never did return except to collect his inheritance in 1924. In 1939 he came to the United States with his French wife under a tourist visa. In October 1940 he registered as an alien, stating that he was last a subject of Austria. The government claimed that by reason of Austria's annexation by Germany in 1938, he became, if not a "citizen" of Germany—which the Court denied in the Schwarzkopf case—at least a "native" of Germany within the meaning of the Act of 1798. There is no doubt that he was a "native" of Austria, wherefrom the court had to infer whether after Anschluss this made him a "native" of Germany. The majority, by Judge Clark, while inclined to believe that annexation was accomplished, regardless of the apparently

¹⁵ *United States ex rel. Ivan J. Zdunic v. Uhl.*

¹⁶ *United States ex rel. Frederic Wakler D'Esquiva v. Uhl.*

conflicting views of the Department of State, and that this made the petitioner a "native" of Germany, remanded the case to the District Court for further inquiry whether the Department of State "recognized" the absorption of Austria into Germany. The dissenting Judge, Swan, thought such inquiry irrelevant, because he concluded that in view of the purpose of the statute to detain aliens likely to entertain friendly feelings for the enemy country, if the President thought their detention necessary, it could hardly be assumed that an Austrian who left the country in 1919 could fall within this class and that a "native" of Austria was not, as a matter of law, a "native" of Germany. The view to be taken of the effect of the word "native" is a matter of policy; but it would seem a little unusual to make this turn on "recognition" of the annexation by the Department of State.

EDWIN BORCHARD

THE TURKISH INSTITUTE OF INTERNATIONAL LAW

The inauguration of the Turkish Institute of International Law on May 14, 1943, at the University of Istanbul, which stands in the shadow of the ancient church of Sancta Sophia near the site of the palace of Justinian the great lawgiver, is an event of dramatic significance. We are inevitably reminded of the fact that for nearly fifteen centuries Turkey was denied the full rights of national independence and equality under international law. The concession to the Christians to be governed according to their own laws, which was magnanimously granted by the Turks when they conquered Constantinople in 1453, was converted under duress by the European Powers into a grievous international servitude through the Capitulations. The sonorous "admission" of Turkey into the Family of Nations by the Treaty of Paris in 1856 did not result in the status of complete independence. Nor did the abolition of the Capitulations by the unilateral action of Turkey in 1914 effect this result. It was not until the Conference at Lausanne in 1923 that the young Turkish Republic, under the brilliant leadership of President Mustapha Kemal Pasha and the Prime Minister Ismet Pasha, now known as President Inonu, was able to wrest from the other nations the recognition of its full independence.

Especially significant, therefore, should be given to the address delivered by the Turkish Minister for Foreign Affairs, Numan Menemencioglu, who presided over the inaugural ceremony of the Turkish Institute of International Law. The following passages warrant particular attention and consideration:

One may ask, after all, if it is advisable to open an Institute of International Law just now when the whole world has been plunged into lawlessness, when all notion of law has been lost and there is indescribable suffering everywhere. One may also inquire as to the few places of refuge still open in the world for even a theoretical discussion of the science known as international law.

Let me first reply to the first question. In doing so I ask you to

imagine a country where law and order and personal security have been thrown overboard. A number of its rare citizens with good will in their hearts have come together to decide upon such measures as might restore the sovereignty of law in their country. These good men are even trying through the medium of new laws to prevent the imminent collapse of their country. Now can you go and tell these good-hearted men to do nothing but wait until the period of chaos passes before they attempt to reestablish the sovereignty of law?

I think it is exactly the same for the international community. Judicial inquiry for the restoration of an era of lawfulness constitutes one of the best means to combat and suppress the anarchy in which we are all now struggling. The Turkish Institute of International Law has been established in response to this vital necessity and is preparing itself to be of service to the world within the framework of realities.

As to the second question, I find it infinitely easier to answer. I proclaim to all from this rostrum that there is a country where international law does not take to shelter but where it reigns supreme. That country is Turkey. Yes, my dear friends, it is because that country is Turkey that you wished me to open the Institute of International Law. It is because that country is Turkey that its Foreign Minister has agreed with joy and pride to fulfill the duty which you confide in him.

The Minister affirmed with justifiable pride that the Republic from the day of its birth had based its foreign relations on respect for law. In its relations with the other Balkan nations it has employed conciliatory methods which have been characterized by justice and high statesmanship. It has strongly upheld the principle of arbitration even to the extent of being willing to arbitrate the customary reservation of sovereign interests. In its respect for the principle of *pacta sunt servanda* Turkey appealed to the signatories of the Lausanne conventions for the revision of the regime of the Straits rather than take arbitrary action as the sovereign power most interested in the Dardanelles and the Bosphorus. During the present war it has vigorously asserted the rights and the obligations of neutrality.

The Minister for Foreign Affairs had strong reasons for greeting with faith and enthusiasm the founding of the Institute of International Law. And the United Nations in their defence of law and order may well be grateful for this robust affirmation of faith in the supremacy of law. It is much more than a heartening gesture: it is a timely rebuke to those defeatists who seem to have assumed that because of the cynical disregard of international law by a few nations it had become worthless and lifeless.

The founding of the Turkish Institute of International Law is a great challenge as well as an inspiration. It serves to draw attention to the fact that the Republic of Turkey has not only attained a position of equality among the nations of the earth but has also attained a position of wise and powerful leadership. It stands as a great bulwark for international law and order in a region where wars have raged for centuries.

The amazing achievements of the Republic of Turkey in both the domestic and the international fields demonstrate most eloquently that only a people

of sterling character could have accomplished so much in so brief a time. The Family of Nations has been greatly strengthened. The cause of law and order has received a great and needed impetus by the establishment of the Turkish Institute of International Law. The American Society of International Law cannot but feel gratified and look forward to a profitable collaboration in the high task of the development and reinforcement of the science of the law of nations.

PHILIP MARSHALL BROWN

SOME QUESTIONS AS TO THE PLACE OF THE INDIVIDUAL IN THE
INTERNATIONAL LAW OF THE FUTURE

Out of the large changes in human life and social organization during the past century, and out of the present crises into which these have led, one result is increasingly apparent and deserves serious study by international lawyers. This is the increased importance of the individual human being. He is, of course, the unit of social life and the centre of human effort; for him all political organization exists, and to serve his needs is the reason for their existence. This has always been true; but it is also true that throughout history he has been submerged beneath these very instruments of his welfare, and frequently forgotten in the power combinations created to serve his ends.

For centuries the sovereign state has been, *ne plus ultra*, the institution to serve and protect the individual; he has not looked beyond the state, and he has expected from the state little more in the way of help than protection against violence, external or internal, and the removal of a few obstacles from the path of his private enterprise. He now needs more than this, and insistently demands it. The developments of the past century have, on the one hand, given him a taste of the higher standards of living now possible for him, and have, on the other hand, weakened his independent situation and made him more dependent upon the group of which he is a member. In the United States he has long enjoyed a comparative prosperity; but he now finds that his past economic freedom and security have been undermined by increasing interdependence and that his sense of physical security has been jolted by the increasing menace and frequency of war. "Freedom from want and freedom from fear" actually mean something to him.

One consequence of the feeling of insecurity and need in which he now finds himself is his realization that the national state alone is incapable of protecting the individual either against war or against economic insecurity. He will therefore—and he now does—demand something outside of and beyond the state. This does not mean the abolition of the state; on the contrary, nationalism is strong, and will doubtless be stronger as a result of this war. But it does mean recognition that nationalism itself must have help; that national sovereignty is not able by itself to provide for the needs of individual human beings. It means that the historic expansion of govern-

ment will now be pushed, by public demand, on into the international field, and that international law will be expanded and strengthened.

It is probably true that, in the transformation of public opinion represented above, the average person is, at the moment, more interested in security against war than in anything else; and this means that he is more interested in international government than in international law. He may be assumed to know, however, that beneath government there must always be law, and he will ultimately be interested in that law, in how it is made and interpreted and applied and enforced, in how it affects him as an individual. The international lawyer, for his part, knows that without an international government behind his law it cannot hope to succeed or to expand; and he knows that international law has for too long disregarded the needs of the individual.

Out of this situation arise a number of questions which the international lawyer should study. In the reshaping of international law and order many studies will be needed, from both theoretical and practical viewpoints, as to the situation of the individual in that law and order. By way of suggestion along these lines, certain questions are listed below, concerning which studies might be made:

1. Is the individual as such to be represented directly in the making of international law, instead of having that law made, as in the past, by sovereign states? In a number of proposals for the post-war world provision is made for direct election by the people of delegates to the international assembly or legislature; in other proposals the argument that any new international system must be a democratic system may lead to the same method.

2. Shall the individual as such be given rights which are to be asserted and upheld as rights under international law? It is probably true that the majority of international jurists—unless recent developments have led to a change of attitude—regard states only as subjects of that law.

3. Are there certain guarantees to the individual which the international system must, for its own security, maintain within and against his own state? For example, it has been argued that there must be an international protection of freedom of speech and information, so that it will not be possible again through censorship and false information for another Hitler to lead his people into conflict with international law and order. Should the international government be allowed to protect a Jehovah's witness against the Supreme Court of the United States? Again, there have at times been conditions within states so inhuman and revolting to the heart and mind of outsiders that intervention and war have resulted. Should international law protect individuals within a state against slavery, or against oppression of minority groups, or should it demand for aliens a "certain civilized standard of justice" and enforce it through international judicial, rather than through diplomatic or military, action? Should the international government be able to reach within a state to prevent individuals from conspiracy against itself, or against other states, or from acts of terrorism?

4. Aside from the above, are there broader human rights which should be asserted and upheld everywhere, even as against the home state? International jurists and associations have studied declarations of the rights of man, and recently churches and governments have devoted much attention to such rights. It is improbable that the Atlantic Charter, or the speeches of various statesmen (in spite of the wit expended against them), intend to guarantee to every individual in the world an assured and generous livelihood at once; but it is clear that we must move in this direction, for an irresistible public demand will necessitate it. How far, then, must the international government be authorized to interfere within a state to secure economic conditions necessary for the welfare of individuals in all parts of the world?

5. Assuming some rights for individuals, what access to international judicial or other procedures should be permitted to them for the protection of these rights? Many practical difficulties arise with this question.

6. What duties might an international government require of individuals? Should it be able to levy and collect taxes from them? to demand citizenship, or military service, or other things?

7. What steps on the part of the international government will be necessary to secure and hold the loyalty of individuals to it? A stamp? A flag? Social security? Control over his instruments of travel or communication?

There is little doubt, in view of the pressing demands of individuals for more security, and in view of their realization that this security depends in part on international law and order, that international law must give more attention to the individual than it has done in the past. Some of the questions above are not immediate, but none of them are very far from early reality, much less fantastic.

CLYDE EAGLETON

INTER-AMERICAN COLLABORATION IN LAW AND LEGISLATION

The purpose of the great liberator Simon Bolívar, in calling the first Pan American conference at Panama in 1826, was "to organize a federation of states which would maintain peace and hold periodic conferences for considering problems of all kinds concerning the general welfare of the Western Hemisphere, especially the Latin portion of it."¹

The conference of the Inter-American Bar Association held at Rio de Janeiro on August 7-12, 1943, like the preceding meeting at Havana in 1941, must be viewed as part of a movement for the strengthening of good international relations. Although unofficial in character the conference was not one of private individuals but of authorized delegates from the constituent bar associations and other special bodies which compose its membership. While other continents were engaged in war the delegates were meeting in the Brazilian capital, with the tacit or express approval of their governments,

¹ Quoted from Duggan, S. P., in *Foreign Affairs*, July, 1940, p. 622.

to explore the potentialities of unification or coördination of legislation and administration between the countries of the Americas. Some of the topics upon the agenda were questions of immigration, nationality and naturalization laws, the unification or coördination of legislation relative to civil status, customs legislation, communications (including air law and telecommunications), commercial treaties, and post-war problems.

The conference had been planned originally to meet at Buenos Aires in 1942, but was postponed for one year on account of the difficulties of travel. The Argentine Federation of Bar Associations not only concurred in the removal to Rio de Janeiro but also made suggestions of new topics for the agenda, including, among others, the enforcement of foreign judgments and the legal specification of crimes committed in one country to be tried in the country in which they take effect.

The persistence with which the American republics have promoted a policy and practice of frequent international conferences for the advancement of international law and general jurisprudence is not to be attributed to scientific interest alone. Consciously or unconsciously, such conferences develop a community spirit and a tradition of friendly and constructive collaboration having definite political consequences. The diplomatic significance of such conferences was well expressed by the late Dr. James Brown Scott at the Eighth American Scientific Congress held under the auspices of the United States Government at Washington in May, 1940:

While nations elsewhere have been mobilizing for war the republics of this hemisphere, without neglecting their own security, have been mobilizing for peace. They have proved conclusively that men of good will, representing nations which prefer to be neighbors rather than enemies, can meet periodically, without the compulsion of elaborate covenants, to discuss and act upon matters of common interest and to promote the common welfare.²

Speaking specifically of conferences dealing with private international law and general jurisprudence he added:

I need not emphasize to you the importance of this phase of the program, for it is obvious that conflicting legal systems and institutions are a serious barrier to coöperation and are only too often a source of misunderstanding and controversy.

The Eighth International Conference of American States held at Lima, Peru, in December, 1939, authorized the appointment of a permanent committee of jurists for the unification of civil and commercial laws of America. No plenary session of this committee has been held as yet, but in its recommendations, submitted to the Faculty of Law of the University of San Marcos at Lima, it was recognized that such uniformity could only proceed by

² United States, Department of State, Proceedings of the Eighth American Scientific Congress, Vol. X, International Law, Public Law and Jurisprudence, Washington, 1943, p. 20.

slow stages "as a gradual work of closer understanding, realizing that any organic plan of codification is outside the realms of possibility."

A century and more of experience has shown that, even with the best of good will, there remain certain obstacles which only time and constructive effort can overcome. The course of trade over a long period has been directed toward Europe rather than between the Americas. The different ties of language and culture, together with the difficulties of transportation, have been the chief obstacles which are only beginning to be overcome in comparatively recent periods. Forces operating to counteract these obstacles became increasingly stronger after the building of the Panama Canal and the outbreak of the first World War. The community of interests between the Americas has been strengthened immeasurably during the present struggle not only for ideological reasons but also upon grounds of manifest self interest. The diversion of trade resulting from the war and the improvement of air transportation have contributed to this result. While political measures for self protection have been taken under the auspices of the Pan American Union, it should be recognized that in order to attain closer economic and cultural relations to survive the present war a progressive practice of coöperation is necessary in the actual administration of justice.

The principal obstacle to any rapid progress in the coördination of the systems of jurisprudence prevailing in Latin American countries and the United States is, of course, the difference between legal institutions of the civil law and those of the common law. Even where the origins of legal institutions are substantially the same differences constantly arise through judicial competition in the territorial scope or application of law and legislation; we know this only too well in dealing with the conflict of laws between the States of the Union. In Latin American countries these conflicts may disturb good relations between the various republics and *a fortiori* between any one of them and a United States jurisdiction, Federal or State. This is a phase of relations with our neighbors to the South which is often neglected. The sanctions of private international law do not seem to lie within the law of nations although this doctrine is maintained by some. These conflicts are not, however, outside the field of diplomacy for the reason that in many civil law countries the bond which unites the individual with his native state remains effective also in his private relations after he has settled in the territory of a foreign state. Even in the United States there is often deep resentment in the courts of one State against the courts of another when jurisdiction is exercised in a manner conflicting with local dispositions over persons deemed to be domiciled citizens. An outstanding example is presented in the field of marriage and divorce,³ and there are others.

³ See *Williams v. North Carolina* (1942), 317 U. S. 287. Some inferior courts still express *dicta* such as the following: "The welfare and safety of the people of this State forbid that the courts of this State be precluded from questioning the jurisdiction of the courts of another State to dissolve the marriage of residents of this State on the application of one of such

Conflicts of law and procedure do not ordinarily result in a *casus belli* between states even in acute cases, although they have been known to cause serious interruptions to good relations. Such conflicts may constitute distinct barriers to smooth and satisfactory trade relations upon which friendly diplomatic intercourse depends. In our relations with the other American republics, widespread resort is made to arbitration clauses in contracts, designed to settle in advance the jurisdiction and the application of law in the event of a dispute. This, however, is only a partial solution. It is, therefore, of great importance that the treaties on private international law, signed at Montevideo on March 19, 1940, by the delegates of Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay, have adopted a number of principles and rules which constitute an appreciable approach toward possible coordination with the law and legislation of the United States.⁴ This is notably the case in their adoption of the law of the domicile as the determinant law for the status and capacity of physical persons,⁵ the territorial principle in respect of civil and criminal jurisdiction and procedure,⁶ and the provisions for the recognition of judgments, awards, and other public documents when authenticated in accordance with the laws of the signatory State from which the document issues.⁷

It is not our purpose here to discuss the substantive provisions of the treaties. The Code of Private International Law (Bustamante Code) now adopted by fifteen Latin American republics, conflicts with some provisions of the Montevideo treaties. There will doubtless be further conferences to adjust these differences and efforts will be made to extend the number of signatories. No general adoption of any of these rules by legislation within the United States is to be expected, but the meetings of the Inter-American Bar Association and official conferences of jurists under the auspices of the Pan American Union will constitute a laboratory of experiment and perhaps achievement of uniformity within certain limited fields of the conflict of laws. The jurists of Latin American countries are admirably trained in the knowledge of their profession. The translation of the Restatement of the Law of Conflict of Laws into Spanish and Portuguese now being undertaken by the American Law Institute will be of great assistance. Unification to the limited extent accomplished between the States of the Union as a result of unofficial conferences of members of the Bench and Bar indicate that prog-

residents and for a cause not recognized here as sufficient for that purpose." Witschief, J., in *Jiranek v. Jiranek*, New York Supreme Court, Jan. 28, 1943. A symposium on *Williams v. North Carolina* is reported in the American Bar Association Journal for May, 1943, p. 268.

⁴ The treaties are published in English in this JOURNAL, Vol. 37 (1943), Supplement, pp. 99 *et seq.*

⁵ Treaty on International Civil Law, Art. 1; *ibid.*, p. 142.

⁶ Treaty on International Civil Law, Art. 56; *ibid.*, p. 149; Treaty on International Penal Law, Art. 1; *ibid.*, 124.

⁷ Treaty on International Procedural Law, Art. 1; *ibid.*, 117.

ress may be expected by similar methods between the republics of the Americas. The establishment of an Inter-American Academy of International and Comparative Law which was discussed both at the Havana and at the Rio de Janeiro Inter-American Bar conferences would create a continuity of research by qualified experts. The subjects would at first encompass a restricted field but the results should be crystallized by legislation or treaty and should not be allowed to remain indefinitely as mere aspirations or enunciations of principle.

ARTHUR K. KUHN

A NEGLECTED PHASE OF INTERNATIONAL JUDICIAL ORGANIZATION

A Commission composed of American lawyers is now engaged in the final determination of claims of American citizens against the Mexican Government going all the way back to the year 1868. Many of these claims were actually decided by an international commission as early as eighteen years ago, within less than sixty years after the breaches of international law which gave rise to the oldest of the claims. That commission was unable to complete its work, the arbitration agreement was replaced by an agreement for the payment of a lump sum, and none of the claimants has received any payment whatever up to the present time. Many of the claimants have, of course, long since passed away, and any awards that may now be made, from funds supplied by Mexico, will come as windfalls to remote successors. If justice delayed is justice denied, surely justice is done to only a slight degree in a process which drags out for more than seventy-five years.

The Mexican example is not quite typical, but it reveals the essential weaknesses of the present system of disposing of international claims. It is only in rare instances that the victims of violations of international law by governments obtain prompt settlement of their claims or even prompt hearing of their complaints. In the case of Major Imbrie, an American consular officer who was murdered in Persia some twenty years ago, the Persian Government, upon demand by our government, immediately paid a substantial indemnity to the victim's widow. In the case of the *Mavrommatis Palestine Concessions* the Permanent Court of International Justice, in 1924, accepted jurisdiction of a complaint by the Greek Government against the British Government, as Mandatory for Palestine, holding that "it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State." In these cases there was prompt action and therefore actual justice. And yet there was nothing in these cases to distinguish them in essential respects from hundreds of other cases which await their turn for long years in foreign offices without the benefit of urgent demands for settlement and without a hearing before courts authorized to do justice.

The minimum security advocated in the Atlantic Charter is closely related to the minimum standard of civilization contemplated in international law.

The chief justification for the institution of diplomatic protection of citizens abroad is, in fact, and has always been, the enforcement of a minimum standard of conduct for governments in their relations with individuals of different nationality. So long as the institution of diplomatic protection continues, there will be occasions for diplomatic representations against, and eventual international claims on account of, violations of the minimum standard of conduct by governments toward aliens. And, whether within or without the framework of an international judicial organization, machinery must be provided for the disposition of such claims.

If international courts of first instance are established throughout the world to hear and determine suits by individuals against states for violation of rights guaranteed by a world constitution and bill of rights, it will naturally fall to such courts to hear and determine complaints by individuals for violations of international law. The fascinating prospect of a federated union of nations, with a world constitution and bill of rights, is, however, far from sure of realization. It may be that some kind of world order will be established between the extremes of the federated union advocated by Prof. Bordwell and others and the preponderance of benevolent power anticipated by Mr. Walter Lippmann. In that event the problem of prompt justice for individual victims of violations of international law may be no nearer solution than it is now, and the following suggestion may be considered as an approach to the solution of that problem.

We suggest an agreement by as many governments as are willing:

(1) for the establishment by each party to the agreement of permanent courts within its own territory, manned by judges of its own choice, to hear and determine, in the first instance, all claims of foreigners for loss and damage through alleged violations of international law, and

(2) for the establishment of a permanent international court, consisting of distinguished lawyers acceptable to all the signatories, with jurisdiction to decide finally cases appealed from the national courts provided for in the agreement.

Stated in other words, our suggestion is:

(1) that all individual claims for damages through violations of international law should be decided in the first instance by national courts of international law, composed of judges specially competent by character and training to decide questions of international law without national bias, and

(2) that a court of appeal, consisting of distinguished lawyers of various nationalities, should be actually always in existence, and not merely capable of being formed, for the disposition of all cases in which the decisions of the national courts of international law are not accepted by the governments of the individual claimants.

The suggestion implies that the initiative in bringing a case before a national court of international law would usually be taken by the individual

claimant and that the burden of preparing evidence and briefs would be borne by him. It does not imply that the individual could not be assisted by his own government, through employment of counsel or otherwise.

The suggestion also implies that a case could not go up on appeal except on motion of the individual claimant's government. This is not a necessary implication, but it would obviously be impracticable for the court of appeal to be made open without restriction to every individual claimant who was dissatisfied with the decision of a national court.

If the suggestion were adopted, there would be not much difficulty in finding in this country judges capable of deciding questions of international law without national bias. American lawyers have, in fact, in numerous instances served ably and with unimpeachable integrity as umpires in arbitrations between our own government and other governments. There would be enough competent judges to man courts of international law in various parts of the country. Some of the judges now on the federal bench might, in fact, be given additional duties as judges of international law courts.

It may be assumed that lawyers equally able and equally free from national bias would be available for service on courts of international law in other countries.

More difficulties of a technical character might be anticipated in the formation of the proposed court of appeal. It is an essential part of the suggestion here made that the court of appeal be always in existence. One method of realizing this part of the suggestion would be to provide for a system of rotation in active service. If, for example, the court of appeal were composed of sixty distinguished lawyers of twenty different nationalities, the court might be divided into three chambers sitting in different regions, and groups of five judges might serve in rotation for periods of three months for each group in each of the chambers. It might be deemed appropriate to provide that no judge should sit in any case involving his own government or one of his own nationals. Shopping around for judges should be discouraged for reasons similar to those which usually operate with respect to choosing one or another of our twelve district judges in the District of Columbia for the trial of a particular case.

A question of incidental interest that would arise as a result of the adoption of the suggestion here made is whether citizens of foreign countries given access to national courts of international law might not enjoy, with respect to remedies against governments, privileges which are not enjoyed by nationals of the countries in which such courts are established or by persons without nationality in those countries. The easy answer to this question is that it is open to national legislatures to accord to their own citizens and to residents without nationality the means of obtaining the benefits of the minimum standard of civilization required by the rules of international law.

Another question that will arise concerns the relationship which the proposed permanent national courts of international law and the proposed permanent court of appeal would bear to the Permanent Court of Arbitration and the Permanent Court of International Justice at the Hague.

The Permanent Court of Arbitration is not actually a court but rather a panel of 150 distinguished individuals who are willing to serve as members of tribunals established under special agreements pursuant to the general provisions of the Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. The Hague panel has been drawn upon in the constitution of arbitral tribunals on only four occasions since the establishment of the Permanent Court of International Justice. The principal function of its members has been for many years the nomination of candidates for membership in the Permanent Court of International Justice. The Hague Conventions for the Pacific Settlement of International Disputes would appear to be ripe for revision. The suggestion here made is one of many suggestions that might be considered in connection with such revision.

The Permanent Court of International Justice will presumably be continued after the war. Its statute may be revised, as suggested by Judge Hudson, to permit it to function in regional chambers more accessible to parties. If some of the current plans for a federated union of nations are realized, there will be an integrated system of international courts, beginning with national courts of international law and going up to the Permanent Court through intermediate courts of appeal. But if those plans are not realized, the national and regional courts of international law here proposed for the disposition of international claims might be integrated with the Permanent Court of International Justice as a court of last resort to which application for certiorari might be made in cases of the gravest importance.

EDGAR TURLINGTON

SOME CURRENT QUESTIONS RELATING TO NEUTRALITY

Events of the recent past have occasioned considerable invocation of law concerning neutral rights and duties. The reality of this law, its current application, and the changes which may be made in it following the Allies' victory, are matters of practical importance. The history of the foreign relations of any particular state which has remained neutral during the present struggle cannot be adequately written until documentary evidence is available. It may not be premature, however, to draw attention to some of the recently reported incidents, and to relate these to pertinent international law. The neutrality of Sweden has perhaps received most general attention in 1943, but certain questions have arisen with respect to the neutrality of other states, and the principal Allies have recently communicated to neutrals certain views concerning refuge for Axis leaders.

Early in June of 1943 there came, from a Russian source, charges of Swedish violations of neutrality through actions favoring the Axis.¹ The Swedish Foreign Office was reported to have denied some of the charges (especially that of Axis recruiting in Sweden), but to have admitted that Swedish forces had convoyed merchantmen (including German merchant ships) in the Baltic Sea when Russian submarines were active in those waters, and that Sweden had permitted the passage through her territory of one armed German division (on the way to Finland in 1941).² Shortly afterward, the German commander in Norway, according to press report, accused the Swedes of failing to return German deserters in accordance with an alleged agreement, and of invoking in this connection "unrealistic" clauses of international law.³ During the same week there came the announcement from Sweden that transit concessions (for the movement of troops and supplies), which Sweden had made to Germany some three years previously, would terminate in August, an action which led one Swedish publication to conclude that "true neutrality" could now be asserted for the country.⁴ After the reported sinking on August 25 by a German destroyer of two Swedish fishing boats off the coast of Denmark,⁵ the Swedish Government protested, but German propaganda broadcasts charged that the fishermen were spying for the Allies, and criticized the "arrogant and provocative" attitude of the Swedish press. The German Government was reported to have flatly rejected the Swedish protest.⁶

¹ The charges were that Sweden had violated Hague Convention V of 1907 in the matter of recruiting and the forming of units under command of Swedish army officers, in permitting the repair of German war machines in Swedish factories, in refusing to intern crews of German military aircraft which had landed in Sweden, in permitting Germans to use Swedish territorial waters and in convoying German transports, in allowing southern Swedish ports to be converted into German bases, and in assuming fictitious ownership of several Finnish ships and permitting them to fly the Swedish flag. The New York Times, June 6, 1943, p. 14, summarizing the charges of Professor Sergei Kryloff in the publication *War and the Working Class*. The charges were supported by figures on the number of carloads of German munitions that had moved on Swedish railroads.

² The New York Times, June 11, 1943, p. 3. The Swedish spokesman claimed, according to report, that the transport of food and ammunition was in accordance with Hague Convention V.

On the general subject see also Naboth Hedin, "Sweden: the Dilemma of a Neutral," in *Foreign Policy Association Reports*, Vol. XIX, No. 5 (May 15, 1943), pp. 52-53.

³ *Ibid.*, July 6, 1943, p. 10. According to report, it was said unofficially for the Swedish Government that it had made no agreement for the return of deserters in uniform or otherwise.

⁴ *Manchester Guardian Weekly*, Aug. 13, 1943, p. 86 (reproducing statement from the *Dagens Nyheter*).

⁵ The New York Times, Aug. 29, 1943, p. 9. The sinkings were not the first reported to have been perpetrated by the Germans. On April 16 the Swedish submarine *Ulvén* had been sunk, allegedly by a German mine. Also reported were attacks inside Swedish territorial waters upon a Swedish submarine, a torpedo boat and an aircraft.

⁶ *Ibid.*, Aug. 31, 1943, p. 3. Swedish newspapers are reported to have labelled the spying charges as brazen and inexplicable.

(The conduct of other neutrals has in various ways come in for attention. In what seems to have been a unilateral action (since the British and American Governments have not announced or published any intergovernmental agreement on the matter), Turkey has apparently repatriated some aviators of belligerent states whom she had previously interned.⁷ Subsequently, it has been noted in Great Britain that Turkey has sent a military mission to Berlin and that the Turks appear to have grown "complacent" about their neutrality at a time when they might have been supposed to "tilt" it in favor of the Allies.⁸) From Russia comes a more direct suggestion that Turkey is following a course of benevolent neutrality toward Germany, and a reminder that Turkey signed a non-aggression pact with the Germans four days after the Nazis invaded Russia.⁹

(Early in June of the present year the Spanish Government, denying that it was acting in the service of another nation, proposed a four-point plan designed to "humanize" aerial bombing—the plan including appointment of a permanent neutral commission which might watch the zones where bombing was not permitted and otherwise check compliance with the proposed agreement.¹⁰ Following British effort to induce Spain to switch over from the position of a "non-belligerent" to that of a real neutral, it is reported that, at a recent meeting with Sir Samuel Hoare, General Franco agreed to withdraw from Russia the Spanish "Blue" Division.¹¹)

(In the Western Hemisphere, an order of the new Argentine Government (in June, 1943), which prohibited future use of codes in international radio-grams, brought protests from Axis powers, but the protests were unavailing.¹²

Portugal has remained neutral, despite Portuguese resentment of the Japanese invasion of Timor in 1942 (the Japanese having stated at the time that they invaded in order to expel Australian and Netherlands forces, but having remained to use the territory as a base for operation), and the more recent Japanese violation of Macao.¹³) According to report, the Portuguese Government has seriously contemplated a declaration of war against Japan and the other Axis powers.¹³

On the subject of refuge in neutral countries for Axis leaders, President Roosevelt made a statement (released July 30, 1943) in which he said, in part:

. . . There are now rumors that Mussolini and members of his Fascist gang may attempt to take refuge in neutral territory. One day Hitler

⁷ *Ibid.*, April 19, 1943, p. 8; May 1, 1943, p. 8; May 7, 1943, p. 5. A public statement of the Turkish Prime Minister concerning his country's relations with Russia, Great Britain, and Germany, respectively (but which does not deal with repatriation of airmen) is quoted in *The Times* (London), June 16, 1943, p. 3.

⁸ *Manchester Guardian Weekly*, July 30, 1943, p. 67.

⁹ *The New York Times*, Sept. 3, 1943, p. 2.

¹⁰ *Ibid.*, June 6, 1943, p. 25.

¹¹ *Ibid.*, Sept. 3, 1943, p. 2.

¹² *The Baltimore Sun*, June 28, 1943, p. 2. Correspondence between the United States and Argentina (*Department of State Bulletin*, September 11, 1943, p. 159) appeared too late for discussion here.

¹³ *The New York Times*, Sept. 3, 1943, pp. 1, 5.

and his gang and Tojo and his gang will be trying to escape from their countries. I find it difficult to believe that any neutral country will give asylum to or extend protection to any of them. I can only say that the Government of the United States would regard the action by a neutral government in affording asylum to Axis leaders or their tools as inconsistent with the principles for which the United Nations are fighting and that the United States Government hopes that no neutral government will permit its territory to be used as a place of refuge or otherwise assist such persons in any effort to escape their just deserts.⁷

Diplomatic representatives of the United States in Stockholm, Ankara, Madrid, Lisbon, Bern, Vatican City, and Buenos Aires (but apparently not in Dublin) received instructions to bring the President's statement to the attention of the governments to which they were respectively accredited. British diplomatic agents in the same capitals, and Russian diplomats in Stockholm and Ankara, made similar representations.¹⁵ While the American Government has not made public the official replies from the neutrals, there have been intimations of unofficial reaction. There has been conjecture that Turkey might reply that international law does not permit the surrender of such persons as the President described,¹⁶ and that, in any case, Axis leaders would not find Turkey a congenial place of refuge.¹⁷ In the Swiss press appeared unofficial statements to the effect that if Switzerland should yield to foreign interference in such a matter she would lose one of the most essential privileges of an independent state, and that decisions as to sanctuary in Switzerland, whatever be the political creed of strangers seeking refuge, must not be influenced by foreign desires.¹⁸

The limits of a brief comment permit only illustrative indications of how questions concerning neutral rights and duties have recently arisen. It is beyond the scope of this comment to pass upon the validity of claims made in each case. It is evident that the "troubles of a neutral" in a world war are likely to be many, and that a neutral is apt to demand its rights more vigorously from a powerful belligerent when the tide of battle begins to turn against that state, as it has now begun to turn against Germany. The significance of the newest moves by such a neutral as Sweden may well be estimated with this in mind.

✓ There will probably be fairly general agreement that, even before September, 1939, neutrality in the traditional (*i.e.*, the nineteenth and early twentieth century) sense had been rather widely discredited. Aside from overstatements to the effect that neutrality had already become a thing of the past, there were less extreme assertions that, basically, neutrality was inconsistent with the kind of world order which the authors of the League of Nations Covenant and the Pact of Paris sought to establish. Some thought

¹⁴ United States Department of State, Bulletin, July 31, 1943, p. 62.

¹⁵ *Idem.*

¹⁶ The New York Times, Aug. 4, 1943, p. 5.

¹⁷ *Ibid.*, Aug. 5, 1943, p. 5.

¹⁸ Statements in the *Gazette de Lausanne*, the *Winterthur Tagblatt*, and the *Basler National Zeitung*, as quoted in the Manchester Guardian Weekly, Aug. 13, 1943, p. 86.

that it was possible to reconcile neutrality and collective security.¹⁹ In the case of at least one major state, it was difficult to reconcile some of the pronouncements of the executive department of the government with the existing statutory law on neutrality, which presumably continued in effect. There was slowness to concede what practice (as, for example, that of the United States) soon demonstrated, namely, that the choice did not necessarily have to be made between total peace and total war, in the sense that a state must either treat the belligerents with meticulous impartiality or go in as a full belligerent on the side of one of them.)

In this situation, a state which was a member of the League of Nations could conceivably have proceeded upon the assumption that the breaking of multilateral treaties, even with a declaration of war, would not give the law breaker a valid claim to any of the traditional rights of a belligerent (in such matters as the stay of warships in neutral ports). The risk which this would have involved, however, and uncertainties as to the precise *legal* effect of the Pact of Paris (which debates in Congress on the Lend-Lease Bill later revealed) naturally entered into consideration. It was less risky, or at least it appeared so, to apply familiar rules on such questions as internment. A neutral taking this course could at least plead that its action was "correct" as measured by long-prevailing practice, and could argue the limited legal force of some of the new multilateral commitments.

✓Early in the course of the hostilities some of the small neutral states had occasion to learn how precarious was the position of a neutral, and how suddenly such a status could be terminated, without notice or justification, by unilateral action of a ruthless belligerent. Even Denmark, which submitted to superior force, and became what has been called the "show-window of the blessings of Nazism,"²⁰ has eventually come to feel the full force of occupation. However, violation of the rights of neutrals does not necessarily mean the destruction of the law which the invaders flouted. In the long run the people whose rulers followed this course seem likely to pay a price for their leaders' lawlessness which few could anticipate in 1940. The countries which wished to remain neutral in 1940 and were not allowed to do so did not commit a breach of any acknowledged legal duty by staying out of the hostilities until they were invaded. That the security which they sought as neutrals was denied them simply emphasizes the precarious situation of small nations in a world where there is not adequate organization of the authority of all the states against law breakers.

For the states which the Axis powers allowed to remain neutral, there is some point in appealing to rules such as those of Hague Conventions V and XIII of 1907. There is much difference between asserting that the conception of legal neutrality (in the sense of impartiality) has already been aban-

¹⁹ Cf. H. Lauterpacht, "Neutrality and Collective Security," in *Politica*, Vol. II (1936), pp. 133-155.

²⁰ The New York Times, Aug. 30, 1943, p. 1 (George Axelsson's dispatch from Stockholm).

done, and asserting that, as a matter of practice, a development has started which seems likely to lead to differential treatment of belligerents as a matter of clear legal right.²¹ As elements of law which are utilized pending the better organization of the international community, the rules concerning neutral rights and duties (many of them having the merit of definiteness, even if some of them have at times been more honored in the breach than in the observance) have proved to have some temporary usefulness and may prove to have some viability in themselves. They have furnished *some* standards by which to arrange the relations of a relatively unarmed state with a powerful belligerent neighbor. They also furnish, in a rather anomalous situation, some rules applicable to relations between Japan, which is neutral as toward Russia's war, and Russia, which is neutral as toward Japan although proceeding, with considerable success, toward destruction of the army of Japan's most powerful ally. To concede, in this sense, some utility to the "old" but still applied rules concerning neutral rights and duties is not, however, to argue for the retention of the legal concept of neutrality (in its traditional form) after the present war.

— vide H. & J. I. ROBERT R. WILSON
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²¹ R. R. Wilson, "Non-Belligerency in Relation to the Terminology of Neutrality," in this JOURNAL, Vol. 35 (1941) pp. 121-123.

CURRENT NOTES

NEW CLASSES OF MEMBERSHIP IN THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Acting upon the report of a committee appointed last year to consider additional types of membership, the American Society of International Law at its annual meeting held on May 1 last, established three new classes of membership—Contributing Members, Supporting Members, and Patrons. The regulations adopted by the Executive Council concerning each of these classes of membership are as follows:

CONTRIBUTING MEMBERS

1. On the nomination of two members in regular standing and upon payment of ten dollars dues for each year, any person may be elected by the Executive Council a contributing member.

2. Any member of the Society heretofore elected may become a contributing member upon written notice to the Treasurer and payment of the annual sum of ten dollars if he has not yet paid his regular dues for the current year or five dollars if such dues have heretofore been paid.

3. Contributing members shall be entitled to all the privileges of annual members. The holders of these memberships will be designated as such in the roster of members.

4. Any contributing member may become an annual member upon written notice to the Treasurer before the expiration of the current year, and shall thereafter pay only the regular dues.

5. Upon failure to pay dues for one year a contributing member may in the discretion of the Executive Council be suspended or dropped from membership.

SUPPORTING MEMBERS

The regulations regarding contributing members apply *mutatis mutandis* to supporting members except that the annual dues for the latter class are twenty-five dollars.

PATRONS

1. Upon payment of five thousand dollars or more, or upon filing with the Executive Council of satisfactory evidence establishing that the Society has been made the beneficiary of such a sum, any person eligible for annual membership and any member heretofore elected may be elected by the Executive Council a Patron of the Society and shall have the full privileges of life membership. The above-mentioned payment or evidence shall be in lieu of dues.

2. A Patron of the Society shall continue to be indicated as such even after his death.

3. As a token of its appreciation, the Society shall list the names of its Patrons in each issue of the AMERICAN JOURNAL OF INTERNATIONAL LAW.

4. Upon payment of five thousand dollars or more, or upon filing with the Executive Council of satisfactory evidence that the Society has been made the beneficiary of such a sum, the Executive Council may declare a deceased person to be a Patron of the Society posthumously. The name of such a person shall be included in the above-mentioned list under the heading "In Memoriam."

In calling attention to these new classes of membership the Secretary requests members who wish to avail themselves of the opportunity of becoming contributing or supporting members to notify him promptly. It is anticipated that the response to this new opportunity to serve the Society will be widespread.

A permanent Endowment Committee was appointed by the Executive Council for the purpose of securing patrons and subscriptions to the endowment fund. The members of the Committee are: Phanor J. Eder, George A. Finch, John Maktos, George Rublee, and Lester H. Woolsey. Members who wish to become patrons or to subscribe to the endowment fund are requested to communicate with any of the foregoing members of the Committee or with the Secretary.

Our Society enjoys today its greatest opportunity to render intelligent service in the planning and organization of a law-governed world community of nations. With the united coöperation of our entire membership we will meet this challenge.

JAMES OLIVER MURDOCK
Secretary

DEATH OF DR. VIKTOR BRUNS

Dr. Viktor Bruns, probably the leading German authority on international law, died in Königsberg, Germany, on September 22, 1943, at the early age of 58. Personable, genial, learned and broad-gauged, he rendered exceptional service to legal education, to scholarship and to his profession. The son of a former Prime Minister of Württemberg, and a member of a family distinguished in the field of statecraft and jurisprudence, he came to international law through the channels of Roman and civil law. In 1910, at the age of 26, he became associate professor of Roman law at Geneva, and probably there acquired that fluency in French which made him as expert a pleader in French as in German. From Geneva he was called to Berlin as associate professor in 1912, becoming a full professor in 1920. There in 1925 he founded the Institute of International Law and Foreign Public Law which will remain a monument to his scholarship, his initiative, his tact and his vision. At a time when economic conditions were serious in Germany, he was able to persuade the Ministry of Education and the research foundation known as the Kaiser Wilhelm Gesellschaft to appropriate funds to enable him to establish the Institute which unofficially bears his name, and of which he became and remained the active Director. He was an important factor in bringing about the establishment of the parallel Institute for Private International Law and Foreign Private Law under the directorship of Professor Rabel.

Beginning with a narrow circle of devoted students and disciples, he assembled over the years a library in international and comparative law con-

sidered among the best in Europe and gathered together a widening group of research workers from all parts of the world who were trained for varying periods in public law and then took their places in the faculties and administrative agencies of Germany and other countries. Dr. Bruns planned and supervised with his able assistants an important body of research which has placed the world in his debt. Among the more notable publications of the Institute are the *Fontes Juris Gentium*, including digests of the legal material to be found in the diplomatic archives of Europe, systematically classified, known as the Digest of the Diplomatic Correspondence of the European States, 1856-1871 and 1871-1878, in seven volumes; a digest of the decisions and opinions of the Permanent Court of International Justice, 1922-1930; a digest of the decisions of national courts in the field of international law, of which only the volume for Germany (1879-1929) has appeared; a three volume collection of political treaties since 1920 and documents of the League of Nations on the security question; the distinguished *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, which had reached volume 9 by 1940. These publications often appeared in several languages and were equipped with meticulous scientific apparatus.

Since only the best of Bruns' students at Berlin University, as well as qualified scholars from other countries, were selected for the Institute, "graduation" therefrom with a favorable recommendation was a certificate of merit opening many doors on the Continent. Dr. Bruns' vast administrative responsibility, in spite of a continuous struggle with poor health in his later years, did not prevent him from writing monographs, from contributing valuable articles to the *Zeitschrift*, or from acquiring among statesmen and academicians an exceptional reputation for mature scholarship and wisdom. His personality and equipment were such that he could step from his directorship or professorship into an arbitral litigation as counsel or judge with equal facility. His services for this exacting work were in constant demand. His four day argument before the Permanent Court of International Justice in the Austrian Customs Union case remains a recognized masterpiece of forensic advocacy. His briefs are models. He sat on many arbitral tribunals and had he been permitted by the German Government, after the death of Judge Schücking, to become a candidate for a judgeship on the Permanent Court of International Justice, would undoubtedly have been elected. While he sought for his Institute detachment from all governmental influence, he nevertheless made the Institute available for legal studies, memoranda and opinions to the Foreign Office and other ministries in Germany and elsewhere, a service frequently invoked. His own opinions were many. Although never a member of the "Party," and revolted by much that offended his own elevated principles, he thought it best to carry on, keeping the Institute out of Party control and maintaining its high standards. This was no easy task. His manifold services, often without knowledge of the victim, to those banished or threatened with banishment, will probably never be

fully known. What will now happen to the great Institute which he founded and brought to such high estate is a matter of conjecture. While a man of extreme modesty, he must have regarded the Institute as the crowning achievement of his life. It is a pity that American foundations have failed to endow a similar educational research institute in this country. In the passing of Professor Bruns the world has lost one of its most constructive thinkers and doers.

EDWIN BORCHARD.

WORK OF THE INTERNATIONAL AND COMPARATIVE LAW SECTION OF THE
AMERICAN BAR ASSOCIATION

This war has greatly stimulated interest in international law, particularly that of lawyers. Also there has grown an insistent demand for progress in this field. The American Bar Association responded by issuing various directives to its International and Comparative Law Section which were initiated by the Section itself. The international law side of the Section's work has therefore received the greater emphasis this past year, although comparative law has not been neglected.

From the standpoint of accomplishment this year's work can best be reviewed by considering the resolutions presented by the Section at the March meeting of the Association's House of Delegates and the sequel to their adoption.

An Effective International Order

RESOLVED, That the American Bar Association endorses, as one of the primary war and peace objectives of the United Nations, agreement among such nations for the complete establishment and maintenance at the earliest possible moment of an effective international order among all nations based on law and the orderly administration of justice.

This resolution precipitated the most spirited and lengthy debate of the entire session of the House of Delegates. Opposition centered upon the idea that "an effective international order" implied an endorsement of the League of Nations or its equivalent. Supporters of the resolution contended that this war will have been fought in vain unless it results in preventing future wars and that some kind of international order is essential to that desired result. This latter view prevailed.

The Section has not attempted to devise a general world plan, for the House of Delegates at the same meeting adopted the report of its Special Committee on Correlation of Post-War Work wherein the Committee expressed "the opinion . . . that the political, social and economic aspects . . . are foreign to the objects of the Organized Bar, even though many men and women of the profession in their individual capacities as citizens will feel free to engage in the study and attempted solution."

However, this Special Committee (of which the chairman of the Section was one of the three members who prepared the report) added ". . . it is pointed out that the lasting settlement of post-war conditions requires the

crystallization of public purpose upon sound and constructive objectives before the end of the war; that the processes of education and leading which are now going on will, in all human probability, increase both in volume and effectiveness; that members of the profession and the public throughout the country are entitled to have the opinion of the organized bar as to the merits of resolutions and measures pending in the Congress, and upon the reports of such executive agencies as may have spoken or shall hereafter proceed in any manner with any branch of post-war planning; that, in view of the great and increasing number of private organizations and people now engaged upon the subject, it seems obvious that the bar either must offer its leadership in the legal and judicial administrative aspects of these activities or stand aside and permit the domain of its special preparation and experience to be occupied by less informed persons. Because it has not been willing to see this occur, your committee has adhered to the latter view."

Creation of a special committee to correlate post-war work was then recommended and it is believed that the activities of the Section will not be unduly curtailed.

An International Judicial System

Next, the Section proposed:

RESOLVED, That the House of Delegates directs the Section of International and Comparative Law to study and report to this House an adequate post-war judicial system of permanent international courts which will provide for an accessible and continuous administration of justice.

Although there was some opposition, the resolution was readily adopted. In compliance with this mandate a Section committee was appointed consisting of Amos J. Peaslee, Chairman, Frederic R. Coudert, John W. Davis, William C. Dennis, Manley O. Hudson, Robert H. Jackson, Howard S. LeRoy, William D. Mitchell, Roland S. Morris, George Wharton Pepper, Jackson H. Ralston and Stanley P. Smith.

This committee presented to the Section at its August meeting in Chicago a unanimous but only tentative report. In the same connection Edgar Turlington had been requested to speak on "Post-war Judicial Organization" and did so, laying emphasis on the desirability of establishing a system of trial courts to deal with international claims. A resolution on the subject was then prepared by the Section Council for presentation to the House of Delegates, but it was determined that the entire matter should receive further consideration by the Section before the Association should make any further commitment.

International Constitution and Bill of Rights

The third resolution proposed by the Section was:

RESOLVED, That the House of Delegates directs the Section of International and Comparative Law to study and report to this House the

fundamental principles, including a bill of rights, which are constitutional in character and which should be generally acceptable as a minimum for the preservation of international order and justice under law.

Contrary to the recommendation of the Board of Governors of the Association, this resolution also carried. Difficulty was encountered by the Section Chairman in obtaining a chairman for a special committee to deal with this problem, hence no report on the subject was made at the August meeting. However, a discussion of the problem at the meeting was arranged for and Professor W. Percy Bordwell presented his plan for adapting the United States Constitution to a world community. Judge Herbert F. Goodrich, on the other hand, though wholly sympathetic toward the world-wide expansion of American ideals, recognized practical difficulties in securing acceptance of what is termed in this country a bill of rights, even by our allies.

International Law and Ocean Fisheries

Without opposition, the following was adopted:

RESOLVED, That the House of Delegates directs the Section of International and Comparative Law to study and report to this House principles which it may be desirable to incorporate into an appropriate treaty or treaties with the United Nations, and ultimately with all nations, to the end that the fisheries of the world may be conserved, and that the general principles recognizing acquired, historic, regional fishing rights and interests based upon custom and practice will be duly established;

FURTHER RESOLVED, That a copy of this resolution be forwarded to the Secretary of State and Secretary of the Interior.

Difference of opinion exists within the Section concerning this subject. The war has emphasized the importance of fisheries as an essential natural food resource. Some members feel strongly that immediate and, if necessary, drastic unilateral action should be taken for the perpetuation of this resource. Others feel that the matter should be handled only through international negotiation.

The House of Delegates in August through its chairman reaffirmed its attitude that something should be done about the matter.

Punishment of War Criminals

A resolution on this subject proposed by the Section was modified in accordance with a recommendation of the Board of Governors and then adopted by the House of Delegates:

WHEREAS, The Hague Conventions and the acknowledged rules of Land and Naval Warfare prohibit treacherous and wanton action by belligerents; be it

RESOLVED, That the House of Delegates directs the Section of International and Comparative Law and such other sections and committees as the House of Delegates may determine, to study proposals as to procedures relating to the punishment of those who have violated the Hague Conventions and the acknowledged rules of Land and Naval Warfare and report to the House with recommendations.

In conformity with this resolution a committee was appointed consisting of Edwin D. Dickinson, Chairman, George A. Finch, and Charles Cheney Hyde. The unanimous report of this committee presented at the Chicago meeting in August is of such importance in clarifying many misconceptions that it is presented in full as an appendix to this review.

Freedom of the Air

The Committee on Transportation and Communications presented by request a resolution concerning the loose use of the phrase "freedom of the air" as if the air over a nation's territory were equivalent to the open sea. As the Association has a standing Committee on Aeronautics the matter was referred to the joint consideration of that Committee and the Section.

Inter-American Bar Association

The Section took a prominent part in the formation of the Inter-American Bar Association and has actively continued its interest. Section members William Roy Vallance and William Catron Rigby are respectively Secretary General and Treasurer of the Association. The Association meeting in Brazil, in August, 1943, was attended by Mr. Vallance as well as by George M. Morris, then President of the American Bar Association, and Mitchell B. Carroll, elected Chairman of the Section for the year 1943-1944. It is believed that the Inter-American Bar Association renders valuable service in promoting acquaintance and coöperation among the lawyers of this hemisphere as well as in other ways.¹

EDWARD A. ALLEN, *Chairman*

APPENDIX

Report of the Subcommittee on the Trial and Punishment of War Criminals

Your subcommittee appointed to examine and report upon this subject has given the assignment consideration and begs leave to report as follows:

Responsible leaders of the United Nations have charged the forces of the Axis powers with war crimes and have announced their intention to punish, "through the channel of organized justice," those guilty of or responsible for such crimes, "whether they have ordered them, perpetrated them or participated in them." The Axis has been warned that war criminals will be required to "stand in courts of law in the very countries which they are now oppressing and answer for their acts."

¹ The remaining portions of the report, dealing mainly with organization matters, are omitted. The following officers were elected for the ensuing year: Chairman, Mitchell B. Carroll; Vice-Chairman, Major Willard B. Cowles; Secretary, Edgar Turlington.

Whatever shape this project may ultimately take, it is of the utmost importance that punishment be administered "through the channel of organized justice." In the present report your subcommittee attempts no more than a brief statement of some of the principal problems and of suggestions for their solution.

1. The problem of most immediate urgency, and one basic to the entire project, is the assembling of evidence. Justice cannot operate on the basis of mere hunch or vague charges of atrocities. The work of assembling, appraising, and organizing the evidence can and must be done now. It is vital that this work be done accurately, comprehensively, and expeditiously. Both military and civilian officials of the United Nations in a position to obtain evidence should be carefully instructed to record and report in authentic detail concerning the place, time, and nature of alleged wrongful acts, the identity of alleged wrongdoers, the identity of injured persons, the identity and availability of possible witnesses, the preparation and preservation of adequate records, etc. Procedures for recording and reporting should be as nearly uniform as may be practicable. No pertinent item of apparent authenticity should be overlooked. It is assumed that this vital work will go forward under the supervision of and in response to encouragement from the United Nations Commission. Unless this work is done thoroughly and well, the entire project may be frustrated.

2. On the basis of the evidence which is being assembled and assessed, it will be necessary to determine with considerable precision the categories of wrongdoers who are to be charged and tried. Mere dragnet procedures are rarely satisfactory and will certainly serve no useful purpose in the present circumstances. The plea of superior orders or of justified retaliation should not be permitted to establish broad immunities and the restricted operation of such pleas should be anticipated and carefully defined. It will be well to concentrate upon the more heinous offenses and upon those who can be shown to have been substantially responsible therefor. This implies considerable selectivity in the determination of categories. Efforts should be directed toward the successful prosecution of the more serious offenders rather than toward the mere prosecution of large numbers. It should be ever in mind that the objective is not revenge but vindication of the processes of organized justice.

3. As the various types of evidence are assembled and the categories of offenses determined, it will be necessary to anticipate problems likely to arise in connection with the rendition of offenders. In anticipation of the unconditional surrender of the Axis powers, the procedures of demand and rendition should be precisely and uniformly established. It is certain that efforts will be made to facilitate escape and frustrate rendition. Such efforts should be anticipated and forestalled. Simple, uniform, and expeditious procedures should be in readiness and should be vigorously executed with such measures of force as may be required. The problems of refuge in third states should also be anticipated and the United Nations should be in agreement with respect to limitations upon efforts to obtain asylum and with respect to the measures which will be taken where an ill-founded right to give asylum is asserted. A clear and firm statement in anticipation of the event is obviously desirable.

4. With the evidence assembled, the offenses determined, and the offenders surrendered, it will be necessary to agree upon the tribunals which are to try the offenders. Problems will arise with respect to the nature, constitution, place of sitting, jurisdiction, and procedure of such tribunals. The Axis has

been warned that offenders will be required to stand trial "in courts of law in the very countries which they are now oppressing." The warning is well conceived and significant. It would appear to negative the idea that international courts need be specially constituted to conduct the trials. Most of the more heinous offenses have been committed in territories of one or another of the United Nations, against the security of the United Nations, or against nationals of the United Nations. If the trials are conducted, at least in the first instance, before civil or military courts of the United Nations, we shall have the advantages of experienced tribunals, constituted of experienced personnel, having authority by virtue of the place of the wrongful acts or the objects of the wrongs committed, and equipped at the outset with established legal procedures. With such resources available, we may well restrain the impulse to set up tribunals ad hoc for a special and limited purpose. In the interest of uniformity, however, and as a safeguard against excessive judgments inspired by the bitterness which total war has naturally engendered, consideration may well be given the suggestion that the United Nations agree to constitute a single international tribunal ad hoc which should be authorized to undertake advisory review upon sufficient showing of excessive penalty or of error of fact or law which has resulted in manifest injustice.

5. It is apparent that trial "in courts of law" and "through the channel of organized justice" means trial according to law. The resources of international law are at hand and trials should be had pursuant thereto. It has long been an accepted principle of international law that a belligerent may punish with appropriate penalties members of the enemy forces within its custody who have violated the laws and customs of war. In some measure such laws and customs have been reduced to conventional agreement, as in the rules annexed to the Hague Convention Concerning the Laws and Customs of War on Land. The principles of criminal law generally accepted among civilized nations are also a proper source of international law. If doubts arise, there should be prompt agreement upon a restatement of what the pertinent law has been and the procedures and penalties which it permits. Caution should be exercised to exclude anything which may fairly be denounced as legislation after the event. As previously emphasized, the aim must be vindication of law and justice and not mere revenge.

6. Since experience with procedures of this kind has hitherto been fragmentary and relatively unsatisfactory, and in view of the importance of maintaining all procedures undertaken on a high and humane level, it may be desirable that the United Nations agree in advance on certain general principles governing the penalties to be imposed. Obviously the penalties should be determined with due regard for the enormity of the offense and the responsibility of the offender. Unification of penalties through the device of advisory review, as suggested in paragraph 4, supra, may provide a useful safeguard, but it will avoid misunderstanding and inspire confidence if agreement on essentials can be announced before the proceedings are instituted. Within broad lines and without attempting to prejudge cases, this should become possible as soon as the vital work of assembling the evidence is sufficiently advanced.

7. As repeatedly emphasized throughout this report, the trial and punishment of war criminals should be before civil or military courts of law, should be conducted according to law, and should have as its primary purpose the vindication of the rule of law to which the United Nations are committed. As regards the element of intent, broadly conceived, there should be no

difficulty. The Axis leaders have long since warned us of the kind of war which they intended to wage. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through legal processes may contribute substantially to the reestablishment of order and decency in international relations.

Respectfully submitted,

EDWIN D. DICKINSON, *Chairman*

GEORGE A. FINCH

CHARLES CHENEY HYDE

July 20, 1943

INTER-AMERICAN BAR ASSOCIATION HOLDS INTERESTING MEETING AT RIO DE JANEIRO

Lawyers from nearly all of the nations of this hemisphere assembled in Rio de Janeiro from August 7 to 12, 1943, for the Second Conference of the Inter-American Bar Association.¹ The war which has been devastating Europe was reflected in the seriousness with which the delegates met and discussed war aims, hemispheric solidarity for the Americas, the punishment of war criminals, the judicial settlement of international disputes, the framework for a post-war world in which peace would be assured by international coöperation, and similar problems. The delegates were also strongly impressed with the importance of aërial warfare, and the status of aviation in the post-war world, since practically all of them arrived at Rio by airplane.

The enthusiasm with which the Brazilians welcomed their visitors was unbounded and the spirit of hospitality which was shown to the visiting lawyers reëmphasized the well-deserved reputation of the Brazilians for making their guests both feel welcome and likewise desire to postpone their departure as much as possible. The Brazilian Government, members of the Cabinet, the Courts, and of the Brazilian Bar Association provided receptions, luncheons, dinners and entertainment to such an extent that the delegates carried away a feeling of warm friendship and fellowship for their hosts.

The work of the Conference was carried on by nineteen Committees, which dealt with the subjects of an Inter-American Academy of International and Comparative Law to be established at Havana, Cuba; Immigration, Nationality, and Naturalization Laws; Patents, Trademarks, and Copyright; the Law of Trusts and Trustees; the Civil Status of Persons; Taxation; Administrative Law and Procedure; Customs Law; Commerical Treaties; Legal Education; Comparative Constitutional Law; Aviation, Telecommunications, Maritime and Highway Transportation; Industrial, Economic, and Social Legislation; Penal Law and Procedure; Fisheries; and Post-War Problems.

As a result of meetings of these Committees, approximately 120 resolutions

¹ For report on First Conference see "The Lawyers of America Meet at Habana," in 75 Pan-American Bulletin 402; for report on November, 1942, meeting of Council see "Post-War Plans of the Inter-American Bar Association," this JOURNAL, Vol. 37, p. 106.

were drafted, and at the closing session they were adopted by a majority of the delegates, reservations being made, however, by the delegates from Argentina, Bolivia, Canada, Chile, the United States, and the Dominican Republic. These resolutions will be prepared in the four official languages of the Conference, namely, Portuguese, English, Spanish, and French.

Among the resolutions considered most important were those adopted by the Committee on Post-War Problems, under the chairmanship of Dr. Raoul Fernandez, who was formerly an active representative of Brazil in the League of Nations. These resolutions include a recommendation with respect to post-war international organization which is similar to the resolution adopted by the House of Delegates of the American Bar Association at its Chicago meeting in March, 1943.² This resolution reads as follows:

Resolution No. 4:

"RESOLVED, that the Inter-American Bar Association endorses as a primary peace objective the establishment and maintenance, at the earliest possible moment, of a universal international system, with judicial, legislative and executive functions based on moral and juridical principles and on the internal experience of all nations and adapted to the requirements and limitations of international coöperation."

Other resolutions adopted by this committee³ recommended the preparation of a "draft declaration of the rights and duties of man," that education and instruction along democratic lines should be taught as it was "the rôle of educators and professors to create and encourage in the minds of youth a fervent love for democracy"; uniformity in penal codes; measures to bring about the execution of arbitral decisions; and the reëstablishment of the Permanent Court of International Justice.

Among the official guests of the Brazilian Government who attended the Conference especially in recognition of the 100th anniversary of the founding of the Brazilian Bar Association, on August 7, 1843, were Carlos Alberto Novaa, Chief Justice of Chile, and Dr. Julio Guani, Chief Justice of Uruguay.

Throughout the Conference the Brazilian delegates were very active in their participation in the meetings of the committees and in making their visitors feel welcome in their beautiful city. The President of the Association, Dr. Edmundo de Miranda Jordão, was especially thoughtful and gifted in presiding on numerous occasions, and aided greatly in promoting a friendly spirit among the delegates. Dr. Levi Carneiro, President of the Brazilian Organizing Committee, and Dr. Oswaldo Trigueiro, Secretary of that Committee, worked tirelessly in the organization of the Conference.

The Conference accepted the invitation received from the President of the Barra Mexicana to hold the next meeting in Mexico City. Lic. Carlos Sanchez Mejorada, President of the Barra Mexicana, was elected as the new

² 29, American Bar Association Journal 248.

³ Resolutions printed at the end of this Note. Professor Charles G. Fenwick sat on the Committee as a representative of the American Society of International Law.

President of the Association, and Dr. Edmundo de Miranda Jordão was elected an Honorary President, in recognition of his services to the Association.

WILLIAM ROY VALLANCE

Annex: Resolutions of the Committee on Post-War Problems.

Resolution No. 1:

1. The Second Conference of the Inter-American Bar Association applauds the effort represented by the Preliminary Recommendations on Post-War Problems drafted by the Inter-American Juridical Committee.
2. The Second Conference of the Inter-American Bar Association recommends to the jurists of America, and particularly to their National Bar Associations that, in carrying out the democratic work of educating and developing public opinion, they express to the Governments of their respective countries their desire that the latter should take into consideration, in so far as possible, the principles embodied in the above-mentioned Recommendation.

Resolution No. 2:

1. Instead of insisting without modification upon the so-called "jus puniendi," giving rise to conflicts of jurisdiction, each State shall give such aid as may be requested of it by any other State in the interest of the prevention of territorial or international crimes. The State of which such request shall be made reserves the right to refuse such request in a case involving a political crime.
2. The movement toward the unification of penal law and the uniformity of the provisions of the penal codes of the American countries, which is already in progress, should be encouraged.
3. International crimes shall continue to be defined by the respective national codes, and the American States shall endeavor, by means of conventions and treaties, to repress effectively such crimes.

Resolution No. 3:

1. The Conference considers necessary the declaration by the international community of the rights and duties of man which characterize democracy.
2. Recommends that the Inter-American Bar Association prepare a draft declaration of the rights and duties of man to be taken up at the next Conference.

Resolution No. 4: quoted above in text.

Resolution No. 5:

RESOLVED, that in order to maintain peace, law and justice in the post-war world, it is indispensable, in addition to establishing juridical and economic formulas, to plan education and instruction along democratic lines, it being the rôle of educators and professors to create and encourage in the minds of youth a fervent love for democracy.

Resolution No. 6:

RESOLVES to proclaim the propriety of encouraging, by all possible means, the unity of America and of supporting the effort of the United Nations to achieve the triumph of justice, the maintenance of democracy and the integrity of moral principles which insure order within the framework of liberty.

Resolution No. 7:

1. The execution of judicial or arbitral sentences should be guaranteed by economic and financial sanctions, and eventually by means of force, applied by the community of nations or with its authorization. However, this compulsory execution should not threaten the territorial integrity or the political independence of the State committed thereto.
2. In practice, the use of these measures postulates an adequate organization of international society, equipped with the appropriate means of guaranteeing obedience to the law and respect for the decisions of justice.

Resolution No. 8:

1. The Permanent Court of International Justice should be maintained with the modifications necessary to adapt its statute to changed circumstances and to the exigencies of the international community. In particular, there should be preserved in its organization, as at present, the fundamental democratic principle of judicial independence and of the separation of the judicial, legislative and executive branches;
2. The Permanent Court of Arbitration should be maintained;
3. The Jurisdiction of the Permanent Court of International Justice and of the arbitral tribunals should be broadened:
 - a) by the submission of all States to the international judicial power and by the extension of the time limit placed upon certain cases submitted to the compulsory jurisdiction of the Permanent Court of International Justice, which may have expired in the course of the present war;
 - b) by making the Court accessible, not only to States and certain national groups, as at present, but also to individuals when their fundamental rights have been violated by States: since the ultimate aim of international law, as of all legislation, consists (or should consist) of the organized protection of the rights of man;
 - c) by the more exact drafting of positive international law to correct its lacunae and defects: the rules of law should be precise, in order to render litigation less arbitrary and to inspire the confidence of the litigants; and should cover subjects which transcend the exclusive interest of the State, thus removing such subjects from the discretionary judgment of domestic legislation and making them susceptible of international judicial decision;
 - d) last but not least, by the organization of international society under the regime of law:—justice, as history has proved, is inseparable from a solidly-established social order.

INTERNATIONAL LAW MEETING IN ENGLAND

According to *The Times*, London, of July 13, an international law meeting was held in that city on July 10–12 past which must be of signal interest to all students and friends of international law in this country and elsewhere.

According to report the meeting was held under the joint auspices of the *Institut de Droit International*, the International Law Association, the Grotius Society, and the Allied University Professors' Association, Sir Cecil Hurst presiding and Professor Henri Rolin acting as Vice President. Resolutions were debated dealing with the following subjects: (1) The extent to

which military occupation can create a valid title of acquisition of rights transferable outside an occupied country and in that of the occupant; (2) Conditions and methods of recognition of governments; (3) Prohibition of war by international law; (4) Settlement of international disputes, including peaceful change. Resolutions were adopted on the first two topics but it was found impossible to complete agreed texts dealing with the last two. Further meeting of the conference was envisaged to continue the discussions.

With respect to recognition of new governments the conference took the third point of the Atlantic Charter (right of all peoples to choose the form of their own governments) as a basis, and recommended that the United Nations exert their influence in the direction of improvement of existing international law and practice concerning recognition. Provisional recognition of a *de facto* government was envisaged, provided the latter "is not put into power by or dependent upon a foreign government." *De jure* recognition should depend upon "general acquiescence of the people"—possibly confirmation *ex post facto*. A new government recognized *de jure* by a certain number of states should be allowed to apply for general recognition before an "international authority having competence for that purpose, the decision of which shall be binding on all states." Withdrawal of recognition should also be allowed on application to the same authority, with similar general effect. The question of recognition, according to M. Rolin, must no longer be a mere football of politics and must be placed upon a level of collective action.

The mere fact that such a meeting was held, under such auspices, is most encouraging, of course. That the participants dared to attack problems of such acute interest for the present and immediate future is also encouraging. That agreement was not found possible on the last two topics, topics which might have been thought to be well on their way to agreed settlement, is slightly alarming. Perhaps it is not entirely premature to suggest that international lawyers and diplomats will prolong their inability—or their refusal—to agree on such matters, in the manner of the 1930's, only at the peril of their own professions and at the tragic expense of international order and progress.

PITMAN B. POTTER

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16–AUGUST 15, 1943

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin and Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

May, 1943

- 12 SOVIET RUSSIA. Foreign Commissar sent to all Ambassadors in Moscow a note, accusing Germany of organizing a slave trade in Soviet citizens taken forcibly from Russia. *B. I. N.*, May 29, 1943, p. 511.
- 14 UNITED STATES—VENEZUELA. Exchanged notes at Caracas relating to the development of foodstuffs production in Venezuela. *D. S. B.*, June 5, 1943, p. 501.
- 15/June 10 COMMUNIST INTERNATIONAL. The Presidium of the Executive Committee of the Comintern at a meeting in Moscow on May 15 decided to propose dissolution of the organization, thus leaving the separate groups to adapt their programs and political activities to the conditions in the various countries where they exist. *N. Y. Times*, May 23, 1943, p. 1. Text of resolution: p. 30; *London Times*, May 25, 1943, p. 3. Dissolution was completed June 10 when the Executive Committee announced that sections in 30 nations had approved unanimously the decision to disband. *N. Y. Times*, June 11, 1943, p. 3.
- 18 CHINA (Nanking)—FRANCE (Vichy). Tokyo radio announced signature of an agreement for "retrocession of exclusive French concessions" in China. *N. Y. Times*, May 19, 1943, p. 4. The Chinese Government (Chungking) declared the agreement for the transfer to the Nanking Government of French rights was a violation of international law, and asserted that the treaties granting extraterritorial rights to China were no longer binding. *B. I. N.*, May 29, 1943, p. 494.
- 18-June 3 FOOD CONFERENCE. United Nations Conference on Food and Agriculture opened at Hot Springs, Va., May 18 with representatives present from 45 countries. *N. Y. Times*, May 19, 1943, p. 1. Agenda: *D. S. B.*, May 1, 1943, pp. 388–389. United States and Chinese delegates proposed creation of an interim commission to carry on the work of the conference and to make plans for a permanent group to consider food and agricultural problems. Text of United States proposal: *N. Y. Times*, May 26, 1943, p. 17. Post-war program offered by French delegation: *N. Y. Times*, May 30, 1943, p. 20. The Conference closed June 3 with adoption of a declaration of principles and 30 resolutions, charging the governments with the responsibility for promoting agricultural and food distribution programs. Official summary: *N. Y. Times*, June 4, 1943, p. 15; *D. S. B.*, June 5, 1943, pp. 497–500. Final Act and section reports: Dept. of State. *Conference Ser.* No. 52; *D. S. B.*, June 19, 1943, pp. 546–572.
- 18 WAR DECLARATIONS. Table showing severances of diplomatic relations, declarations of war, and adherences to the United Nations Declaration (American Republics only) to May 18, 1943. *P. A. U.*, August, 1943, p. 448.

- 20 AMERICAN-MEXICAN CLAIMS COMMISSION. Edwin D. Dickinson sworn in as General Counsel of the Commission, having been appointed pursuant to the terms of the "Settlement of Mexican Claims Act of 1942." *D. S. B.*, May 22, 1943, p. 457.
- 20 CHINA—GREAT BRITAIN. Exchanged ratifications at Chungking of the treaty for the relinquishment of extraterritorial rights in China, signed Jan. 11, 1943. *D. S. B.*, May 22, 1943, p. 458; *N. Y. Times*, May 21, 1943, p. 4; *London Times*, May 21, 1943, p. 4.
- 20/24 CHINA—UNITED STATES. Exchanged ratifications at Washington of the treaty for the relinquishment of extraterritorial rights in China, signed Jan. 11, 1943. *D. S. B.*, May 22, 1943, p. 458; *N. Y. Times*, May 21, 1943, p. 4. It was proclaimed by President Roosevelt on May 24. *D. S. B.*, May 29, 1943, p. 475.
- 21 CHINA—UNITED STATES. Effected agreement by exchange of notes at Chungking regarding jurisdiction over criminal offenses by armed forces. Texts of Chinese statement and notes: *D. S. B.*, Aug. 21, 1943, pp. 114-116.
- 23 ANTI-COMMUNIST PACT. German broadcasts stated the Anti-Communist Pact will retain full validity, despite decision to dissolve the Comintern. *N. Y. Times*, May 24, 1943, p. 1.
- 24 BRAZIL—UNITED STATES. Exchanged notes at Washington in regard to the reciprocal application to Brazilian citizens in the United States of the Selective Training and Service Act of 1940, as amended. Texts: *D. S. B.*, June 12, 1943, pp. 528-530; *Ex. Agr. Ser.* No. 327.
- 25 MEXICO—UNITED STATES. Inaugural session of the Mexico-United States commission of experts to formulate a program for economic coöperation between the two governments took place at Washington. Work will be terminated at the end of 30 days. *D. S. B.*, May 29, 1943, p. 473.
- 31 EL SALVADOR—UNITED STATES. Exchanged notes at Washington in regard to the reciprocal application to Salvadoran citizens in the United States of the Selective Training and Service Act of 1940, as amended. Texts: *D. S. B.*, June 12, 1943, pp. 531-534; *Ex. Agr. Ser.* No. 325.
- 31 SAFE CONDUCT. The safe conduct granted to Greek ships working for Switzerland was withdrawn by Germany. *B. I. N.*, June 12, 1943, p. 541.
- 31-June 22 FRENCH UNITY. A governing body for France was created at Algiers, under the joint presidency of Generals Giraud and de Gaulle. Seven members of the Committee took office, leaving two places vacant. *N. Y. Times*, June 1, 1943, pp. 1, 4. The French Committee of National Liberation was formally established on June 3 at Algiers in order to pursue the war on the Allies' side. *London Times*, June 4, 1943, p. 4; *N. Y. Times*, June 4, 1943, p. 1. Statement of policy: p. 3. The Committee officially announced on June 7 the formation of a cabinet of 14 members to act as the governing agency until a provisional government can be established. *N. Y. Times*, June 8, 1943, p. 1. Personnel: p. 4. The Committee decided that Gen. Giraud should retain command of the French armies in North Africa, Gen. de Gaulle to continue as commander of all French forces elsewhere in the Empire. *N. Y. Times*, June 23, 1943, p. 5.

June, 1943

- 1/16 MEXICO—UNITED STATES. Exchanged ratifications on June 1 at Mexico City of the consular convention, signed August 12, 1942. *D. S. B.*, June 5, 1943, p. 501. Proclaimed June 16 by President Roosevelt. To be in force on and after July 1, 1943. *D. S. B.*, June 19, 1943, p. 545.
- 4 AFGHANISTAN—UNITED STATES. First Afghan Minister presented his letters of credence. *D. S. B.*, June 5, 1943, p. 495.

- 4 GERMANY—SWEDEN. German reply to Swedish protest against anchored German mines in Swedish territorial waters denied laying minefields, expressed regret and offered to help sweep for the mines. *B. I. N.*, June 12, 1943, p. 542.
- 4-7 ARGENTINA. Argentine troops, under Gen. Arturo Rawson led a revolt which caused President Castillo to flee with his ministers. General Rawson became head of a provisional military government, and declared martial law throughout Argentina. *N. Y. Times*, June 5, 1943, p. 1. President Castillo resigned and General Rawson became President June 5. *N. Y. Times*, June 6, 1943, p. 1. The new revolutionary government decreed the dissolution of the Congress on June 6. *N. Y. Times*, June 7, 1943, p. 1. General Pedro Ramirez became President on June 7. *N. Y. Times*, June 8, 1943, p. 1.
- 7-22 FRENCH COMMITTEE OF NATIONAL LIBERATION RECOGNITION. Recognition granted by Luxembourg, Belgium, Yugoslavia, Czechoslovakia and Poland. *N. Y. Times*, Aug. 30, 1943, p. 3. Greek Government-in-exile announced its recognition July 22. *B. I. N.*, Aug. 7, 1943, p. 708.
- 8 LIBERIA—UNITED STATES. Exchanged notes and signed lend-lease agreement in New York City. *N. Y. Times*, June 9, 1943, p. 15. Texts: *D. S. B.*, June 12, 1943, pp. 515-518; *Ex. Agr. Ser.* No. 234; *United Nations Review* (New York), July 15, 1943, pp. 308-309.
- 8 POISON GAS. At his press conference President Roosevelt stated that the use of gas by any nation against one of the United Nations would result in retaliatory like use by the United Nations. Text of statement: *N. Y. Times*, June 9, 1943, p. 3; *D. S. B.*, June 12, 1943, p. 507.
- 9/10 PARAGUAY—UNITED STATES. President Higinio Morinigo arrived in Washington on June 9 and addressed the Congress next day. Address: *Cong. Record* (daily) June 10, 1943, pp. 5685-5686.
- 9-15 ARGENTINE RECOGNITION. Granted by the following countries: June 9—Brazil, Chile, Bolivia, Paraguay. *N. Y. Times*, June 10, 1943, p. 7. June 10—Germany, Italy, Spain. *N. Y. Times*, June 11, 1943, p. 4. Uruguay and Peru. *N. Y. Times*, June 12, 1943, p. 5. June 11—United States, Great Britain, Japan, Mexico, Canada, Hungary, Sweden, Poland, Bulgaria, Colombia, Venezuela, Nicaragua, Ecuador, Greece, The Netherlands, Dominican Republic, Panama, Honduras, Belgium (in exile), France (Vichy), the Vatican. *N. Y. Times*, June 12, 1943, p. 5. June 12—El Salvador. *N. Y. Times*, June 15, 1943, p. 6. June 15—Cuba. *D. S. B.*, June 12, 1943, p. 520.
- 9-August 13 FRENCH COMMITTEE OF NATIONAL LIBERATION RECOGNITION. The following countries announced recognition of the Committee: Uruguay, June 9; Netherlands, July 6; Cuba, Aug. 13. *N. Y. Times*, June 10, July 7, Aug. 14, 1943, pp. 4, 3 and 3.
- 10 WAR RELIEF AND REHABILITATION. United States Department of State announced that a draft agreement for a United Nations relief and rehabilitation administration has been submitted to the United Nations and the 11 nations associated with them for their consideration. *N. Y. Times*, June 11, 1943, pp. 1, 9. Text: *D. S. B.*, June 12, 1943, pp. 524-527; *London Times*, June 11, 1943, p. 3.
- 11 SOVIET RUSSIA—UNITED STATES. In a message to Secretary of State Hull, Foreign Commissar Molotov assured the United States that Anglo-American-Russian coöperation will be extended in the postwar period. *N. Y. Times*, June 12, 1943, p. 4. Text, together with Secretary Hull's reply: *D. S. B.*, June 12, 1943, p. 514.
- 14 NETHERLANDS (in exile)—UNITED STATES. Effected agreement by exchange of notes at Washington, supplementing the lend-lease agreement, signed in Washington,

- July 8, 1942. Texts of notes: *D. S. B.*, June 26, 1943, pp. 594-595; *Ex. Agr. Ser.*, No. 326.
- 15 FINLAND—UNITED STATES. Finland resumed payment on its war debt by its payment of \$168,945. *N. Y. Times*, June 16, 1943, p. 1.
- 15 FRANCE (Vichy)—TURKEY. Turkey recalled its Ambassador. *N. Y. Times*, June 18, 1943, p. 4.
- 16 POLAND—SOVIET RUSSIA. Premier Stalin promised that Russia will do everything possible to aid in the creation of a strong and independent Poland, according to a broadcast address, made at a conference of Polish patriots. *N. Y. Times*, June 17, 1943, p. 3.
- 19 AXIS POWERS—COLOMBIA. A Colombian executive decree empowered the Government to attach and dispose of all Axis properties when required for the common good or national security. *N. Y. Times*, June 20, 1943, p. 7.
- 22 SOVIET RUSSIA. On the second anniversary of Russo-German war, a special communiqué asked a second front in 1943. *N. Y. Times*, June 22, 1943, p. 1. Excerpts: p. 8.
- 23 COLOMBIA—UNITED STATES. Exchanged ratifications at Washington of the supplementary extradition convention, signed at Bogotá, Sept. 9, 1940. *D. S. B.*, June 26, 1943, pp. 600-601.
- 23 PRESS INTERNATIONALE. Met in Vienna and was attended by delegates from Hungary, Rumania, Bulgaria, Croatia, Slovakia, Norway and other occupied countries. Organized by Goebbels. *B. I. N.*, July 10, 1943, p. 619.
- 28 BOLIVIA—BRAZIL. Announced trade agreements, by one of which a free zone was created at Santos, Brazil. Another provided for creation of a commission to study a formula whereby Brazil would cede to Bolivia the port of Aurora, near the mouth of the Paraguay River. Brazil would be compensated by territory elsewhere along the frontier. *N. Y. Times*, June 29, 1943, p. 4.
- 29 WAR CRIMES. Appointment of Herbert C. Pell as United States representative on the United Nations Commission for the Investigation of War Crimes was announced. *D. S. B.*, July 3, 1943, p. 3.
- July, 1943*
- 2/30 BLACKLIST. Department of State issued cumulative supplements nos. 3 and 4. Dept. of State Publications, Nos. 1952 and 1968.
- 5 JAPAN—THAILAND. Japanese radio announced Japan had "ceded" 6 states of Malaya and Burma to Thailand. *N. Y. Times*, July 6, 1943, p. 4; *B. I. N.*, July 10, 1943, p. 639.
- 5 HUNGARY—TURKEY. Signed trade agreement. *B. I. N.*, July 10, 1943, p. 638.
- 7/13 MARTINIQUE. French Committee of National Liberation named Henri Hoppenot as a delegate to negotiate the return of Martinique and Guadeloupe to the Empire. Brig. Gen. Jacomy was appointed to command French military forces in the Antilles and French Guiana. *N. Y. Times*, July 8, 1943, p. 7. On July 13 Monsieur Hoppenot was appointed governor of the French Antilles. *D. S. B.*, July 17, 1943, p. 32.
- 9 GREAT BRITAIN—MEXICO. Published agreement, exempting nationals of each country from service in the other's military forces. *N. Y. Times*, July 10, 1943, p. 6.
- 10 UNITED STATES—VATICAN. Text of President Roosevelt's note to Pope Pius, released from the White House, giving assurance of all possible respect for churches

- and religious institutions in Italy and the neutral status of Vatican City and its domains throughout Italy: *N. Y. Times*, July 11, 1943, p. 5.
- 14 MEXICO—UNITED STATES. Mexico made first payment since 1928 on its external debt, held in the United States, under the terms of the agreement ratified Dec. 29 last by the Mexican Congress. *N. Y. Times*, July 15, 1943, p. 32; *P. A. U.*, Aug. 1943, p. 467.
 - 15 UNITED NATIONS INTERIM COMMISSION ON FOOD AND AGRICULTURE. Inaugural session convened at the Pan American Union. Delegates and addresses: *D. S. B.*, July 17, 1943, p. 33-38. Officers elected and committees: *D. S. B.*, July 24, 1943, p. 52.
 - 16 GREAT BRITAIN—ITALY—UNITED STATES. Churchill and Roosevelt sent joint message urging the Italian people to capitulate. Text: *N. Y. Times*, July 17, 1943, p. 2; *D. S. B.*, July 17, 1943, p. 27-28.
 - 17 MEXICAN-AMERICAN COMMISSION FOR ECONOMIC COÖPERATION. Issued report. Text: *D. S. B.*, July 17, 1943, pp. 40-46.
 - 19 CANADA—UNITED STATES. By exchange of notes effected an agreement for naming the highway from Dawson Creek to Fairbanks the Alaska highway. Text: *D. S. B.*, July 24, 1943, p. 53-54; *Ex. Agr. Ser.* No. 331.
 - 19-31 PAN AMERICAN PHYSICAL EDUCATION CONGRESS. First Congress was held at Rio de Janeiro. Due to transportation problems no delegation was present from the United States, although American Army and Navy officers and Ambassador Caffery attended in an unofficial capacity. *D. S. B.*, Aug. 21, 1943, p. 113.
 - 25/28 ITALY. Mussolini and Cabinet resigned. *N. Y. Times*, July 26, 1943, p. 1. Text of announcements by the King and Marshal Badoglio: p. 5. On July 28 the Rome radio announced dissolution of the Fascist party. *London Times*, July 29, 1943, p. 4; *N. Y. Times*, July 29, 1943, p. 1.
 - 28-August 8 EMERGENCY ADVISORY COMMITTEE FOR POLITICAL DEFENSE. To hold session in Washington. Program: *D. S. B.*, July 24, 1943, p. 51.
 - 30-31 WAR CRIMES. President Roosevelt issued on July 30 a statement urging neutral nations to deny asylum to war criminals. Text: *N. Y. Times*, July 31, 1943, p. 3. On July 31 Great Britain, Soviet Russia and the United States sent notes to the governments of Argentina, Sweden, Switzerland, Spain, Portugal, Turkey and the Vatican calling on them to refuse asylum to any Axis war criminals and declaring any assistance contrary to the principles for which the United Nations are fighting. *B. I. N.*, Aug. 7, 1943, pp. 708, 724; *D. S. B.*, July 31, 1943, p. 62.

August, 1943

- 1 BURMA—JAPAN. Japan granted independence to occupied Burma and the two countries signed a treaty of alliance. *N. Y. Times*, Aug. 2, 1943, p. 7.
- 1 CHINA. President Lin Sen died. *N. Y. Times*, Aug. 2, 1943, p. 15; *D. S. B.*, Aug. 14, 1943, pp. 97-98.
- 1 CHINA—FRANCE (Vichy). China severed diplomatic relations. *N. Y. Times*, Aug. 1, 1943, p. 8.
- 1 WAR DECLARATION. Burma declared war on the United States. *N. Y. Times*, Aug. 2, 1943, p. 7.
- 4 REFUGEES. Executive Committee of the Intergovernmental Committee on Refugees met in London to consider the recommendations of the Bermuda conference. *D. S. B.*, Aug. 14, 1943, p. 98.
- 5/15 GERMANY—SWEDEN. Announced agreement whereby transport of German troops and equipment by Swedish railways would cease on August 20. *N. Y. Times*,

- Aug. 6, 1943, p. 1; *London Times*, Aug. 6, 1943, p. 4. Sweden decreed August 15 that courier aircraft must not be used to transport German military personnel across Swedish territory. *N. Y. Times*, Aug. 16, 1943, p. 5.
- 7 DESTROYERS SALE. The United States Department of State announced that Great Britain had offered to assume the costs of compensating private owners of property involved in the establishment of United States bases on British territories. In the original agreement the United States would be responsible for this. *N. Y. Times*, Aug. 10, 1943, p. 11; *D. S. B.*, Aug. 14, 1943, pp. 96-97.
- 7-12 INTER-AMERICAN BAR ASSOCIATION. 2d conference was held at Rio de Janeiro. *N. Y. Times*, Aug. 8 and 13, 1943, pp. 16 and 4.
- 9 ETHIOPIA—UNITED STATES. Signed lend-lease agreement and exchanged notes at Washington. *N. Y. Times*, Aug. 10, 1943, p. 16. Texts: *D. S. B.*, Aug. 14, 1943, pp. 93-96.
- 12 GERMANY—ITALY—SWEDEN. Official German statement declared German railways can no longer transport Swedish goods enroute to Italy. *N. Y. Times*, Aug. 13, 1943, p. 2; *B. I. N.*, Aug. 21, 1943, p. 749.

INTERNATIONAL CONVENTIONS

TELECOMMUNICATION CONVENTION. RADIO REGULATIONS AND PROTOCOL. TELEGRAPH REGULATIONS AND PROTOCOL. Madrid, Dec. 9, 1932.

Adherence recorded:

Paraguay. March 4, 1941. *D. S. B.*, July 3, 1943, p. 6.

TELECOMMUNICATION CONVENTION. TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Adherence:

Ethiopia. March 16, 1943. *D. S. B.*, Sept. 4, 1943, p. 155.

MONEY ORDERS. Panama, Dec. 22, 1936.

Ratification:

Panama. April 30, 1943. *D. S. B.*, June 12, 1943, p. 534.

POWERS OF ATTORNEY. Protocol. Washington, Feb. 17, 1940.

Ratification deposited:

Colombia (with reservation). June 10, 1943. *D. S. B.*, June 26, 1943, p. 601.

JUDICIAL DECISIONS

AGUILAR v. STANDARD OIL CO. OF NEW JERSEY *

SUPREME COURT OF THE UNITED STATES

[April 19, 1943]

A shipowner's liability for maintenance and cure extends to a seaman who, departing on or returning from shore leave (though without any duty to perform for the ship while on leave), is injured while proceeding, without misconduct, across a dock or other property which was the only available route between the vessel and the public streets.

Mr. Justice RUTLEDGE delivered the opinion of the court.

The question presented by these cases is whether a shipowner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured while traversing the only available route between the moored ship and a public street. The injury in No. 582 occurred while the seaman was departing for his leave. That in No. 454 occurred while he was returning.

The complaint in No. 582 discloses that the plaintiff, respondent here, was a messman on the Steamship *Beauregard*, owned by defendant. On January 16, 1941, the vessel, which apparently was engaged in the coastwise trade between New Orleans and East Coast and Gulf ports, was moored to Pier C, Port Richmond, Philadelphia. At about 6 p.m. plaintiff left the ship on shore leave. As he was proceeding through the pier toward the street all the lights were extinguished. In the ensuing darkness he fell into an open ditch at a railroad siding. This caused injuries which required treatment and prevented him from resuming his usual duties. This action followed, for maintenance and cure and wages. On defendant's motion the District Court dismissed the complaint. The ground assigned was that at the time of his injury plaintiff was not ashore on the ship's business. The Third Circuit Court of Appeals reversed and remanded (130 F. 2d 797), holding that on the facts stated in the complaint defendant was liable for maintenance and cure and wages.

The stipulation of facts in No. 454 discloses that on April 18, 1938, the defendant's vessel, the Steamship *E. M. Clark*, was lying docked at the premises of the Mexican Petroleum Company, in Carteret, New Jersey, which defendant neither owned, operated nor controlled. Petitioner, a member of the crew, obtained permission from the master and went ashore on his own personal business. In order to reach the vessel on returning from shore leave, he had to pass through the premises of the Mexican Petroleum Company. After he had gone through the entrance gate and while he was walking on the roadway of those premises about a half mile from the ship, he was struck and injured by a motor vehicle which was neither owned, operated

* No. 454; together with No. 582, *Waterman Steamship Corp. v. Jones*; 318 U. S. 724.

nor controlled by the defendant. Petitioner brought this action to recover \$10,000, the expense of his maintenance and cure for the injuries so incurred. The District Court dismissed the complaint and on appeal the Second Circuit Court of Appeals affirmed. 130 F. 2d 154. Both courts acted on the ground that in going ashore on personal business the plaintiff left the service of the ship and therefore no liability for maintenance and cure attached.

The cases were brought here to resolve the conflict thus presented on an important question of maritime law.

All admit the shipowner is liable if the injury occurs while the seaman is "in the service of the ship," and the issue is cast in these ambiguous terms, the parties giving different meanings to the ancient phrase.

The claimants say it includes the whole period of service covered by the seaman's articles; and, if he is injured during this time, the right is made out, unless it is shown by way of defense he has forfeited it by misconduct causing the injury. Since the injuries here took place during the period and there was admittedly no misconduct, it is said the claims are established. Corollaries of this view are that recovery is not conditioned on showing the injury was received while the seaman was at work or doing some errand for the employer and that going ashore with leave or returning from it is part of being "in the service of the ship," whether or not it was to perform such an errand.

The shipowners regard the phrase more narrowly. In their view it requires the seaman to be injured, if ashore, while he is "on duty" or at work, doing some task connected with the vessel's business. Going ashore simply for diversion and relief from its routine and discipline or for any matter personal to the seaman takes him out of the service of the ship; and the departure is made the moment he steps off deck and onto the dock or pier, perhaps as he descends the gangplank or ladder. *Cf. The President Coolidge*, 23 F. Supp. 575 (D. C.). Likewise return is not made until he is on board again. *Cf. Lilly v. United States Lines Co.*, 42 F. Supp. 214 (D. C.). In this view it is of no moment whether the injury results from the seaman's fault or misconduct or from causes entirely beyond his control.

It will aid in determining the scope of the liability to consider its origin and nature.

From the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements and the limitations of human adaptability to work at sea enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working,¹ that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servi-

¹ *Cf. Holmes, J.*, dissenting in *Tyson and Brother v. Banton*, 273 U. S. 418, 447.

tude for others to these extraordinary hazards and limitations of ship life.

Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformly have imposed broad responsibilities for their health and safety upon the owners of ships.² In this country these notions were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship,³ hospitalization at home⁴ and care abroad.⁵ The statutes are uniform in evincing solicitude that the seaman shall have at hand the barest essentials for existence. They do this in two ways. One is by recognizing the shipowner's duty to supply them, the other by providing for care at public expense. The former do not create the duty. That existed long before the statutes were adopted. They merely recognize the

² As Mr. Justice Story, then on circuit, observed in *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.), at 483, "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . If these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation. Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw."

³ *E.g.*, Act of July 20, 1790, c. 29, § 8, 1 Stat. 134; Act of June 7, 1872, c. 322, § 41, 17 Stat. 270; 46 U. S. C. §§ 666, 667, requiring that ships carry a minimum supply of medicines and antiscorbutics. Act of July 20, 1790, c. 29, § 9, 1 Stat. 135; Act of June 7, 1872, c. 322, § 36, 17 Stat. 269; Act of Dec. 21, 1898, c. 28, § 12, 30 Stat. 758; R. S. 4565; 46 U. S. C. §§ 661, 662, requiring that ships carry sufficient and adequate stores and water for the crew. See also 17 Stat. 277, 46 U. S. C. § 713. Act of June 7, 1872, c. 322, § 42, 17 Stat. 270, R. S. 4572; Act of June 6, 1884, c. 121, § 11, 23 Stat. 56; Act of Dec. 21, 1898, c. 28, § 15, 30 Stat. 759; 46 U. S. C. §§ 669, 670, providing that certain basic clothes and heating facilities be furnished by the shipowner; 46 U. S. C. §§ 672-672(c), 673, prescribing qualifications and quotas for crews, and watch divisions.

⁴ Act of July 16, 1798, c. 77, 1 Stat. 605; Act of March 2, 1799, c. 36, 1 Stat. 729; 2 Stat. 192; R. S. 4808-13; 24 U. S. C. §§ 1, 6, 8, 11, 193.

⁵ Act of Feb. 28, 1803, c. 9, § 4, 2 Stat. 204; 2 Stat. 651; R. S. 4577; 46 U. S. C. § 678, requiring consuls in the case of sick and destitute seamen abroad to provide for their subsistence and return passage to the United States.

preexisting obligation and put specific legal sanctions, generally criminal, behind it. Compare *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.); *The George*, 1 Sumn. 151, 10 Fed. Cas. No. 5329 (C. C.); *The Forest*, 1 Ware 429, 9 Fed. Cas. No. 4936 (D. C.). The provisions for public assistance were not intended to relieve the shipowner of his duty. On the contrary their purpose was to make sure the seaman would have care, if the employer should fail to give it and in the rarer cases to which his obligation does not extend. The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights. Cf. *Reed v. Canfield*, 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.). Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises, and particularly when it relates to the general character of relief the legislation was intended to secure.

Among the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service.⁶ In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment.⁷ Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act,⁸ in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship.⁹ So broad is the shipowner's obligation that negligence or acts

⁶ See, e.g., Laws of Oleron, Articles VI, VII; Laws of Wisbuy, Articles XVIII, XIX; Laws of the Hanse Towns, Articles XXXIX, XLV; Marine Ordinances of Louis XIV, of Marine Contracts, Title Fourth, Articles XI, XII, compiled in 30 Fed. Cas. 1171-1216; cf. *Harden v. Gordon*, *supra*.

The Laws of Oleron are typical of the provision for injuries: "If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; . . . but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." Article VI.

⁷ *Harden v. Gordon*, 2 Mason 541, 11 Fed. Cas. No. 6047 (C. C.); *The Atlantic*, Abb. Adm. 451, 2 Fed. Cas. No. 620 (D. C.); *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371.

⁸ Cf. *The Osceola*, 189 U. S. 158; *Pacific Steamship Co. v. Peterson*, 278 U. S. 130; *O'Donnell v. Great Lakes Dredging Co.*, No. 320, October Term 1942, decided February 1, 1943; *Brown v. The Bradish Johnson*, 1 Woods 301, 4 Fed. Cas. No. 1992 (C. C.); *The A. Heaton*, 43 Fed. 592 (C. C.); *The Mars*, 149 Fed. 729 (C. C. A.).

⁹ *The City of Alexandria*, 17 Fed. 390 (D. C.); *The A. Heaton*, 43 Fed. 592 (C. C.); *The Wensleydale*, 41 Fed. 829 (D. C.); *Sorenson v. Alaska S. S. Co.*, 247 Fed. 294 (C. C. A.); *Peterson v. The Chandos*, 4 Fed. 645 (D. C.); cf. *Seely v. City of New York*, 24 F. 2d 412 (C. C. A.); cf. *Reed v. Canfield*, 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.).

short of culpable misconduct on the seaman's part will not relieve him of the responsibility. *Peterson v. The Chandos*, 4 Fed. 645 (D. C.); see also *The J. F. Card*, 43 Fed. 92 (D. C.); *The Ben Flint*, 1 Abb. (U. S.) 126, 3 Fed. Cas. No. 1299 (D. C.). Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. *The Ben Flint*, *supra*. The traditional instances are venereal disease¹⁰ and injuries received as a result of intoxication,¹¹ though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.¹² Other recent cases, however, disclose a tendency to expand these traditional exceptions.¹³

Consistently with the basic premises of the liability, it was early suggested that the risks which it covered were not only those arising in the actual performance of the seaman's duties. *Reed v. Canfield*, 1 Sumn. 195, 20 Fed. Cas. No. 11,641 (C. C.); *Ringgold v. Crocker*, Abb. Adm. 344, 20 Fed. Cas. No. 11,843 (D. C.). Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment; it is the framework of his existence. For that reason among others his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment. In this respect it is a broader liability than that imposed by modern workmen's compensation statutes.¹⁴ Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's part amounting to ground for forfeiture, at least while he is on the ship, "subject to the call of duty as a seaman, and earning wages as such." *The Bouker No. 2*, 241 Fed. 831, 833 (C. C. A.), certiorari denied, 245 U. S. 647; *Calmar S. S. Co. v. Taylor*, 303 U. S. 525, 527-8; *Holm v. Cities Service Transportation Co.*, 60 F. 2d 721 (C. C. A.); *Highland v. The Harriet C. Kerlin*, 41 Fed. 222 (C. C.); *The Quaker City*, 1 F. Supp. 840 (D. C.); compare *Neilson v. The Laura*, 2 Sawy. 242, 17 Fed. Cas. No.

¹⁰ *Pierce v. Patton*, Gilp. 435, 19 Fed. Cas. No. 11,145 (D. C.); *The Alector*, 263 Fed. 1007 (D. C.); *Chandler v. The Annie Buckman*, 21 Betts 112, 5 Fed. Cas. No. 2591 a (D. C.); *Zambrano v. Moore-McCormick Lines, Inc.*, 131 F. 2d 537 (C. C. A.); *Wytheville*, 1936 A. M. C. 1281 (D. C.).

¹¹ *Barlow v. Pan-Atlantic Steamship Corp.*, 101 F. 2d 697 (C. C. A.); *The Berwindglen*, 88 F. 2d 125 (C. C. A.); *Lortie v. American-Hawaiian Steamship Co.*, 78 F. 2d 819 (C. C. A.); *Oliver v. Calmar S. S. Co.*, 33 F. Supp. 356 (D. C.)

¹² *The Quaker City*, 1 F. Supp. 840 (D. C.).

¹³ Cf. text and note 15 *infra*.

¹⁴ Compare *Yukes v. Globe Steamship Corp.*, 107 F. 2d 888 (C. C. A.); but cf. *States Steamship Co. v. Berglann*, 41 F. 2d 456 (C. C. A.), certiorari denied, 282 U. S. 868; *Holm v. Cities Service Transportation Co.*, 60 F. 2d 721 (C. C. A.).

10,092 (D. C.); *Callon v. Williams*, 2 Lowell 1, 4 Fed. Cas. No. 2324 (D. C.).¹⁵

When the seaman's duties carry him ashore, the shipowner's obligation is neither terminated nor narrowed.¹⁶ When he leaves the ship contrary to orders, however, the owner's duty is ended.¹⁷ Between these extremes are the instant cases, raising for the first time here the question of the existence and scope of the shipowner's duty when the seaman is injured while on shore leave but without specific chore for the ship. Liability in that circumstance was obscured in the first maritime codes¹⁸ and although early suggested has been recognized only implicitly in lower federal courts.¹⁹ Very recently it has been explicitly denied in several district courts.²⁰

We think that the principles governing shipboard injuries apply to the facts presented by these cases. To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are "exclusively personal" and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, "the superfluous is the necessary . . . to make life livable"²¹ and to get work done. In short,

¹⁵ The recent tendency to confine the scope of the obligation to those shipboard injuries which are caused by the requirements of the seaman's duties [*Meyer v. Dollar S.S. Line Co.*, 49 F. 2d 1002 (C. C. A.); *cf. Brock v. Standard Oil Co. of N. J.*, 33 F. Supp. 353 (D. C.)]; is consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy. *Calmar S. S. Co. v. Taylor*, *supra*, at 529.

¹⁶ See *e.g.* Laws of Oleron Art. VI, VII; Laws of Wisbuy Art. XVIII, XIX; Laws of Hanse Towns Art. XXXIX, XLV; see also *The Montezuma*, 19 F. 2d 355 (C. C. A.); *Gomez v. Periera*, 42 F. Supp. 328 (D. C.).

¹⁷ Sound reasons of discipline long have impelled this rule. *Cf., e.g.*, Laws of Oleron, Art. VII; Marine Ordinances of Louis XIV, *supra*; Laws of Wisbuy, *supra*; and compare *Pierce v. Patton*, *supra* note 10.

¹⁸ Thus while the Laws of Oleron and the Marine Ordinances of Louis XIV, *supra*, relieve from liability for injuries incurred while on shore without leave, they say nothing on the question here involved. Similarly, the Laws of Wisbuy, *supra*, are ambiguous on this point. The Laws of the Hanse Towns suggest that any injuries received otherwise than in the ship's service are not within the right to maintenance and cure.

¹⁹ *E.g.*, *Reed v. Canfield*, *supra* note 9; *The Berwindglen*, *supra* note 11; *cf. The J. M. Danziger*, 1938 A. M. C. 685 (D. C.).

²⁰ *Smith v. American South African Line, Inc.*, 37 F. Supp. 262 (D. C.); *Wahlgren v. Standard Oil Co. of N. J.*, 42 F. Supp. 992 (D. C.); *Collins v. Dollar Steamship Lines, Inc. Ltd.*, 23 F. Supp. 395 (D. C.).

²¹ Holmes, J., dissenting in *Tyson and Brother v. Banton*, 273 U. S. 418, 447.

shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.

The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If in those surroundings the seaman, without disqualifying misconduct, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment.

It was from considerations of exactly this character that the liability for maintenance and cure arose. From them likewise, its legal incidents were derived. The shipowner owes the protection regardless of whether he is at fault; the seaman's fault, unless gross, cannot defeat it; unlike the statutory liability of employers on land it is not limited to strictly occupational hazards or to injuries which have an immediate casual connection with an act of labor. An obligation which thus originated and was shaped in response to the needs of seamen for protection from the hazards and peculiarities of marine employment should not be narrowed to exclude from its scope characteristic and essential elements of that work. And, indeed, no decision has been found which so narrows the shipowner's parallel obligation in the case of sickness or disease. Rather the implications of existing authority point the other way. Cf. *The Bouker No. 2*, *supra*.²² The considerations, including those of public interest adverted to by Mr. Justice Story, which support the liability for illness,²³ or for injuries received aboard ship, likewise sustain it for injuries incurred on shore leave, as were those now in issue. To exclude such injuries from the scope of the liability would ignore its origins and purposes.

There is strong ground, therefore, for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore

²² See also *Holmes v. Hutchinson*, Gilp. 447, 12 Fed. Cas. No. 6639 (D. C.); *The Forest*, 1 Ware 429, 9 Fed. Cas. No. 4936 (D. C.); *The Nimrod*, 1 Ware 1, 18 Fed. Cas. No. 10, 267 (D. C.); and see cases cited *supra* note 10.

²³ At the argument it was suggested that a reason which might sustain the imposition of liability for sickness innocently contracted on shore leave, but not for injuries so incurred, would be the difficulty of proving origin ashore. The difficulty undoubtedly would exist in some cases, but hardly in all. No authority has been found which suggests this explanation. Rather, cases of illness, which are within the reason and policy of the liability, are indistinguishable from cases of injury received without misconduct. The risk of incidence is not less in the one case than in the other. The afflicted seaman is made as helpless and dependent by injury as by illness. His resources for meeting the catastrophe and his employer's burden are not greater because he is hurt rather than ill.

leave. Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf. In this view, the nature and purposes of the liability do not permit distinctions which allow recovery when the seaman becomes ill or is injured while idle aboard, *cf.* *Calmar Steamship Co. v. Taylor*, 303 U. S. 525; *The Bouker No. 2*, 241 Fed. 831 (C. C. A.); *Holm v. Cities Service Transportation Co.*, 60 F. 2d 721 (C. C. A.); *The Quaker City*, 1 F. Supp. 840 (D. C.), or when doing some minor errand for the ship ashore, *Gomes v. Pereira*, 42 F. Supp. 328 (D. C.), but deny it when he falls from the ladder or gangplank as he leaves the vessel on shore leave, *cf.* *The President Coolidge*, 23 F. Supp. 575 (D. C.), or is returning from

IN RE ANGLO-INTERNATIONAL BANK, LIMITED *

Court of Appeal

[Lord Green, M. R., Luxmore and Goddard, L.JJ. June 1, 1943.]

Company—Capital—Resolution to reduce—Notice of meeting not sent to shareholders in enemy and enemy-occupied territories—Right of shareholders to notice under articles of association—Position under statute and at common law—Validity of resolution—Trading with the Enemy Act, 1939 (2 and 3 Geo. VI., c. 89), s. 1 (2)—Defence (Trading with the Enemy) Regulation, 1940 (S. R. and O., 1940, No. 1092).

The articles of association of the appellant company provided that notices of meetings should be given to members either personally or through the post at their addresses registered with the company. The company held a meeting to pass a special resolution for the reduction of capital in excess of its working requirements. The resolution was passed, but notices of the meeting were not sent to 99 shareholders whose addresses registered with the company were in enemy or enemy-occupied territories. On the question whether the resolution was validly passed,

Held, that the prohibition imposed by s. 1 (2) of the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulation, 1940, which forbade the company from having or attempting to have any communication with any of the 99 shareholders, so that it would be an offence merely to post the notices addressed to them at their registered addresses, was equivalent to suspending their right to receive notices; that during the period of suspension they were in no better position than they would have been if under the company's articles of association they were given no right to receive notices; and that accordingly the resolution was validly passed.

The position at common law discussed.

V/O Sovfracht v. Gebr van Udens Scheepvaart en Agentuur Maatschappij (*ante*, p. 101; [1943] A.C. 203) referred to.

Decision of BENNETT, J., reversed.

This was the appeal of Anglo-International Bank, Limited, against the decision of Mr. Justice Bennett, who, on April 12, 1943, dismissed the company's application for the sanction of the Court to a reduction of capital which had been approved by a special resolution, from £2,000,000 to £1,509,998, by returning capital in excess of the requirements of the company.

Of the 2,000,000 £1 shares of the company, 46,552 were held by 99 shareholders whose addresses, as registered in the company's books, were in enemy or enemy-occupied territory. Notice of the meeting to pass the resolution for the reduction of capital had not been sent to any of those 99 shareholders

on the ground that they all had addresses in enemy or enemy-occupied territory.

Mr. Justice Bennett, in dismissing the petition, said that the company had proved that the capital was in excess of its requirements, and that the only obstacle was that it had not complied with the articles of association. He gave leave to appeal.

Mr. Harold Christie, K. C., and Mr. Cecil Turner appeared for the company.

THE MASTER OF THE ROLLS, reading the judgment of the Court, stated the question raised and said: The question is one of general importance. In the present case we were told that it has a special importance since, if it was necessary to send notices of meeting to these shareholders, the result would be to invalidate earlier resolutions of the company and one consequence of this would be that the company would not now have a properly elected board of directors.

Section 117 (1) of the Companies Act, 1929, requires for the effective passing of an extraordinary resolution that notice of the meeting shall be "duly given." Subsection (2) defines a special resolution as one passed by the majority required for an extraordinary resolution at a meeting "of which not less than twenty-one days' notice . . . has been duly given." The meaning of the words "duly given" is to be ascertained by reference to section 115, which contains provisions as to notices which are to have effect "so far as the articles of the company do not make other provision in that behalf." Article 55 of the company's articles of association prescribed that notices of meetings in the form there specified "shall be given to the members in manner hereinafter mentioned." Article 140 provided that a notice may be served either personally or by sending it through the post addressed to the member at his registered address. The position, therefore, is that the right of a member to receive a notice and the obligation of the company to serve it are determined by the contract the terms of which are to be found in the articles. The shareholders are entitled to have and the company is bound to give exactly what the articles require, no more and no less. In the case of this company, all that a shareholder can require is (at the option of the company) either personal service or service by posting to his registered address. No other means of service are provided.

It cannot, we think, be disputed that if the right of a shareholder to receive the contractual notice is abrogated or suspended by operation of law—or, putting it another way, if the performance of the company's obligation to serve the contractual notice on him becomes illegal—the shareholder, during the period of abrogation, suspension or illegality, must be treated as having lost his contractual right to receive notice. The effect of this must be that the articles must be treated as though they had expressly denied to that shareholder the right to receive notices so that a meeting could be regularly called without him. The question in this case is whether or not all the 99

it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared, or surrendered or retaken under the pressure of superior force, but there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a *settled acquisition*."

On page 222 he stated the opinion of Lord Stowell to have been that "effective subjugation and firm possession *with the intention of keeping the conquest*," are the test. On page 229 he applied the principles which he had enunciated to the case of Holland. Speaking of the inhabitants he said: "They are under the dominion and control of the Germans, who exploit them, plunder them, and tyrannize over them for the benefit of the German Reich. *It is clear that the Germans do not intend to relinquish their possession unless forced to do so.*" The words which we have italicized in these passages would appear to indicate that an intention on the part of the enemy to keep the country which he has subjugated as part of his territorial possessions is an element which must be present. Such an intention was, Lord Wright said (at p. 229) one of the matters before the House which were treated as of "common notoriety." On what facts or information this treatment was based does not appear. But if an intention of this character is a necessary element we are not sure to what extent the Court is entitled in a case like the present where there is no opposition to treat as notorious matters on which it has no information except what may be gathered from official publications and the public Press. Thus we do not see how we can assume that the enemy intends to "keep" France—or Belgium—or Greece—or the Channel Islands in the sense of incorporating them permanently in his possessions. We cannot, however, think that the expression "keep" was intended by Lord Wright to be used in this sense. One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation does not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word "keep," as used by Lord Wright, in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the House. Thus the Lord Chancellor said (59 *The Times* L. R., at p. 102; [1943] A. C., at p. 211): "If, as a result of the occupation, the enemy is provisionally in effective control of an area at

the material time and is exercising some kind of government or administration over it, the area acquires 'enemy character.' " Lord Atkin said ([1943] A. C., at p. 213): "When a British Court has to consider what is the nature and extent of the enemy occupation which makes the resident an enemy, I think that in these days one of the most important tests would be the extent to which the enemy, while in occupation, assumes to control the civil rights of the subjects of the occupied country. And if that control be for the material time effective I am inclined to think that it matters not that the enemy contemplate to withdraw that control at some future time or on some future event, whether distant or not." Lord Thankerton (at p. 216) said that it is "a question of degree." Lord Porter said (at p. 238): "The inevitable conclusion must, I think, be drawn that Holland has been for some two years, and is at present, enemy-occupied territory controlled and administered by the enemies of this country"; and (at p. 240) he said: "The solution, in my view, depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former Government is superseded." And again (at p. 245): "It is enough, in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers." In view of these expressions of opinion we hope that we are justified in reading the language of Lord Wright in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language.

But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation. In the case of Poland, Czechoslovakia and Belgium, if we are entitled to accept what may be described as matters of common notoriety, the occupation would appear to be of the requisite character. In the case of such parts of Yugoslavia and Greece as are under effective enemy control, the case would appear to be the same. In the Channel Islands, if current reports are to be accepted, German interference with and control of the inhabitants and their civil rights would appear to be substantial and effective. What the exact position is in that part of France which was previously unoccupied seems obscure. We have no information as to the extent to which civil rights are being interfered with by the enemy in that part of France, save what is generally known with regard to conscription of labour. In the case of Monaco, where there is one shareholder, we have some information. His name is Giuseppe Cogito, his profession that of *ragioniere*, or accountant. His earlier registered address was in Milan and the notepaper on which he notified his change of registered address to Monte Carlo gave two addresses in Italy as well as an address at Monte Carlo. We were invited to infer from these facts that he is an Italian national, but I do not think that we should be justified in doing so. The Foreign Office was unable to give any information as to the date or con-

tions of the occupation of the Principality by Axis troops which, it said, had clearly been there for some time. The Consul-General of Monaco in London, in reply to an inquiry, states that, so far as he is aware, life is normal in the Principality which is, he understands, "not occupied" although Italian troops are there. From this information, for what it is worth, we would infer that the occupation of Monaco is at present only a military occupation although the Italian claims to the French coast as far as Nice may well suggest an ultimate intention on the part of Italy to annex the Principality as well.

On the evidence before us we do not think that it would be safe to hold that all the shareholders whose registered addresses are in enemy-occupied territory are to be regarded as alien enemies at common law. But the position under the Trading with the Enemy Act, 1939, is different, and to an examination of that we now turn. By section 2 (1) of the Act "enemy" is defined as meaning (among other things) "(b) any individual resident in enemy territory." "Enemy territory" is defined in section 15 (1) as meaning "any area which is under the sovereignty of or in the occupation of a Power with whom his Majesty is at war . . ." Section 15 of the Act was amended by Order in Council dated July 10, 1940, by the insertion of subsection (1A) as follows:—"The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the Order as they apply in relation to enemy territory, and the said provisions shall apply accordingly." Under this subsection orders have been made applying the Act to Monaco (S. R. and O. 1940, No. 1476), to what used to be known as unoccupied France (S. R. and O. 1940, No. 1219), to Yugoslavia (S. R. and O. 1941, No. 543), and to mainland Greece (S. R. and O. 1941, No. 613). So far as we are aware, no similar orders have been made with regard to "occupied France," Poland, Belgium or the Channel Islands, but the occupation of these areas by the enemy is notorious and they fall within the definition of enemy territory contained in the Act itself.

By section 1 (2) of the Act the offence of trading with the enemy consists in having "any commercial financial or other intercourse or dealings with, or for the benefit of, an enemy." Particular instances are given, including (iii), the performance of any obligation to . . . an enemy. By paragraph 2 (1) of the Defence (Trading with the Enemy) Regulations, 1940 (S. R. and O. 1940, No. 1092) the Act was amended by expressly making it an offence to attempt to trade with the enemy.

As the result of this legislation, the company was forbidden by law to have or attempt to have any communication with any of the 99 shareholders. It would have been an offence merely to put in the post notices addressed to them at their registered addresses. This is equivalent to suspending their right to receive notices and during the period of suspension they can, in our opinion, be in no better position than they would have been if under the articles of association no right to receive notices had been given to them. The resolution therefore was validly passed.

We have not so far referred to the power of the Crown, but at common law and under the Act, to grant a licence to communicate with an enemy. It might be suggested that the company ought to have applied for a licence authorizing the sending of the notices, and there is reason to suppose that if it had done so a licence would have been granted, at any rate in some of the cases if not in all. In our opinion there is no substance in this point. At the time when the meeting was called it was in fact illegal to send notices to these shareholders since no licence had been granted. We can find no reason for thinking that there was any obligation on the company to put itself to the trouble of applying for licences. Such an obligation could only exist by virtue of some contractual right in the shareholders concerned, and no such right exists or can be implied. All that the shareholders are entitled to under the articles is to have the notices put in the post, and this was, at the relevant time, forbidden by law. It is worth observing that, even if a licence had been applied for and obtained, and even if the notices had reached the shareholders, they could not have voted at the meeting otherwise than by proxy, and before proxies could have been accepted and acted on, the persons to whom proxies were given would themselves have had to obtain licences to act.

The appeal is allowed, and the reduction of capital is confirmed.

BOOK REVIEWS AND NOTES

The Permanent Court of International Justice, 1920-1942, A Treatise. By Manley O. Hudson. New York: The Macmillan Company, 1943. pp. xxiv, 780. Index. \$7.00.

All plans for world organization after the war include a court as an essential part of any structure designed to make the processes of a world society move more smoothly and regularly and to contribute to the peace of the world through the settlement, by judicial methods, of those disputes which are susceptible of decision through such a process. How a court which gains the confidence of the governments and peoples can be a great force in maintaining good order in the society of states, without which peace is not likely to continue, the volume under review helps the reader to understand.

The reviewer happens to be particularly interested in the relations of the Court to the growing mass of international engagements which before the war ranged from such constitutional documents as the Covenant of the League and the Labor Part of the Treaty of Versailles, through important multipartite conventions regulating many sections of human affairs—economic and social—, to agreements between two states covering matters of interest only to them. As in national affairs so in international affairs these agreements of a legislative character are taking an ever more important place in the complex modern society. The interpretation of international agreements is one of the most important functions, if not the most important, of an international tribunal. Judge Hudson is fully conscious of the importance of this point, which he treats at length in Chapter 29. He notes that in most cases before the Court the interpretation of a treaty was involved, and he adds valuable notes from the fullness of his reading and observation on the way the Court has proceeded in its interpretation of treaties.

The reviewer is entirely in accord with Judge Hudson's opinion that it is the duty of the Court so to interpret a convention that it will carry out the intention of the parties, and with his observation that the parties were often not able to arrive at a definite meeting of minds in phrasing a particular point in a convention (pp. 643-644). The reviewer believes that, when it happens that the intention of the parties is not clear in respect to the situation before the Court, the Court should consider what an American court would call the "legislative history" of the convention, from which it can discover the situation which the parties were trying to deal with and the solution, broadly speaking, which they proposed. With this guide the Court should examine the agreement and if it cannot find the specific intention of the parties, should apply their general intention, without doing violence to the words of the agreement.

This book brings down to date Judge Hudson's volume of 1934 of the same

title. It contains the fruits of the observation and study of the cases and documents relating to the Court by an acute and painstaking student who has had the great advantage of sitting as a Judge on the Court. As a carefully ordered documentary study of the history of the inception and judicial life of the Court it will be a useful handbook for draftsmen of a new Court Statute, or for those students who wish an overall picture of one of the great international institutions of our time. It is more than this, however, for Judge Hudson criticises the drafting of sections of the documents and makes suggestions as to the methods of the Court. His comments deserve consideration, not only as those of a careful legal scholar but as those of a judge who has seen the work of the institution from within. For example, his observation that national judges "have usually supported the contentions of the Governments of which they were nationals or by which they were appointed" (p. 355), and his discussion of the cases, seems to the reviewer ample evidence of the wisdom of the provision of the Statute authorizing a government to appoint a judge to sit on a case if one of its nationals is not on the Court.

In the chapter on advisory opinions Judge Hudson gives a brief analysis of the situation in respect to which opinions have been asked and a useful statement of the effect of each opinion. The reviewer believes that he makes a strong case for the continuance of the advisory opinion, if there be in the new world order a body like the Council or the Assembly to request it, but that its use should be limited and that it should not be resorted to in dealing with disputes between governments, which normally would take the form of contested cases. Sometimes, however, an advisory opinion was asked at the request of the governments interested in the dispute when the conditions were such that the governments preferred that an advisory opinion should be asked by the Council rather than for them to institute an action in the Court. The advisory opinion is useful as a means of bringing before the Court questions involving the interpretation of such constitutional documents as the Covenant of the League or the Constitution of the International Labor Organization. Here questions of law are involved which might be difficult to get before a court in any other way. Fortunately, the opinion strongly advocated by Judge John Bassett Moore has prevailed: "The Court has not thought it feasible to fill a dual rôle, acting at one moment as a judicial body rendering judgments on international differences, and at the next moment as a board of counselors giving private and *ex parte* advice on such matters."¹ If it was merely a legal opinion which the international body wanted they could resort to their own legal staff or appoint a body of lawyers. When one of them goes to the Court it goes for an opinion arrived at openly and by a judicial process, an opinion therefore which will have greater weight than that of a body of lawyers, no matter how eminent. An international body should be careful not to submit questions predominantly political in their nature although they may involve legal questions also.

¹ International Law and Some Current Illusions, p. 131.

The appendices contain the Statute and Rules of the Court and other pertinent documents, thus making this volume more usable.

JOSEPH P. CHAMBERLAIN

The International Steel Cartel. By Ervin Hexner. University of North Carolina Press, 1943. pp. xxii, 339. Appendices. Index. \$6.00.

Many students of post-war matters have been concerned with the problem of cartels. Some believe that cartel organization should be encouraged and that if placed under proper international control, cartels would provide a useful framework for the growth of orderly economic relations. Others are filled with foreboding, fearing that cartels will become monopolistic groups engaged in strangling competition, restricting production and denying opportunities for industrial development in new areas. Into this controversy Professor Hexner now injects a highly useful volume dealing with the international steel cartel, in which he was a representative of the Czechoslovak steel industry. Prof. Hexner provides facts; he sets forth, on the basis of his own long experience and careful research, a documented historical record which is of great value. He also supplies some conclusions. These are cautious and unsensational but they should have a sobering, cooling effect in the midst of all the heat generated by extremists.

With the exact details of the organization of the international steel cartel and with the purely economic aspects of its operations, international lawyers may not be so greatly concerned, but they will certainly be interested in the political and legal elements involved. Chapter 1 ("General Considerations"), Chapter 10 ("Political Implications"), and Chapter 11 ("Conclusions") all contain much that is significant for everyone having to do with international politics and law. Post-war "blue-printers," for example, should take heed of Dr. Hexner's constant emphasis upon the fact that the steel cartel operated efficiently without any elaborate formal constitution. "There were only hazy records and conventions composing what may be called the constitution of the International Steel Cartel" (p. 4). What written documents there were "were only very brief fundamentals on which the network of rules, principles and practices . . . was constructed" (p. 97). "Juristic thinking and strict procedure, which would have made . . . operations intricate and would have resulted in a bureaucratic machine with red tape, were entirely unknown in the realm of the International Steel Cartel. . . . Jurisdictions were not precisely allotted and there was no doctrine of the separation of powers nor a system of checks and balances. . . . The seeming mystery of how such a machine could work so smoothly without a coördinating bureaucracy is readily solved by the knowledge that the same individuals who established the policy of the International Steel Cartel directed as well those sub-entities within the International Steel Cartel" (p. 5).

From the legal standpoint Dr. Hexner terms the international steel cartel

an "itinerant international association." It operated "without a corporate charter from, or any other recognition as a legal unit by, any politically established public authority" (p. 12), and he concludes the legal discussion by saying: "It is highly improbable that problems in regard to the status of international cartels may be answered according to what we call international law today." Cartels may get along "as de facto entities in a legal vacuum" (p. 14). Favoring public supervision of cartels, Dr. Hexner suggests that under a reasonable interpretation of Art. 24 of the Covenant, the League might have taken over regulation of cartels. As to the future he says we must go beyond mere generalizations concerning the desirability of international control and face the complexities involved. "One wonders," he says, "whether consumer and labor representatives could agree among themselves on a steel price policy to be followed in export markets" (p. 270), and, though he does not pretend to answer all the questions he raises, Dr. Hexner states that a strong international political government will be needed to support the decisions of supervisory agencies and that such agencies at the very least must subject international combinations to full publicity so that the world may know whether artificial scarcities are being created and whether outsiders are being allowed to operate.

The author does not think the international steel cartel seriously influenced international politics or was itself gravely affected by international events until the time of its dissolution after the start of the war in 1939. International steel cartel decisions were taken entirely on economic grounds, he maintains.

"The International Steel Cartel did not contribute actively to the maintenance of peace nor did it serve as a link in an international conspiracy of capitalists against world peace" (p. 239). Cartels, he argues, may be used for both good and evil purposes; extreme generalization is to be deplored. Like the joint stock company, they are at our disposal and a cartel organization "might consist of national groups striving for business profits, trying to act according to the intentions of their democratic national governments and if occasion arises resisting abuses of concentrated economic power" (p. 239). Evidently Dr. Hexner believes that we should keep cartels and that we can direct them toward socially and economically desirable ends. A brief review cannot possibly do justice to such an illuminating and helpful volume. It deserves to be widely read by international lawyers, political scientists, and economists alike.

PAYSON S. WILD, JR.

The International Law of the Sea. By A. Pearce Higgins and C. John Colombos. London, New York, Toronto: Longmans, Green and Co., 1943. pp. xvii, 647. Index. 42s.

Anyone who has ever attempted to give a course in international law especially designed for naval candidates can testify to the need for a good text. The slender book long in use at the Naval Academy is pathetically inade-

quate and out of date. The series of volumes of International Law Situations issued by the Naval War College, while uniformly high in quality, can hardly meet the need which a one volume work can fill. It is therefore with high expectations that one welcomes this treatise by the distinguished international lawyer, the late Pearce Higgins, and his pupil, C. John Colombos, whose studies on the Law of Prize well qualify him to carry on the work of his illustrious teacher.

These two Englishmen present us with a condensed but exceedingly able presentation of the subject matter in twenty-two chapters, in two parts—War and Peace—which leaves no significant heading of this specialized treatment untouched. While here and there one might have wished a fuller treatment, the book is none the less a masterly consideration of the whole subject in a little over six hundred pages of text of close type. An examination of seven pages of Table of Cases cited and copious footnotes, testifies to careful documentation from reported cases, texts, and leading articles in the journals. While Anglo-American practice predominates, other systems are not neglected.

This study is so long overdue that one cannot regret that the publishers hastened its publication at this time even though the present war should make a second edition necessary within a few years. Since some World War II cases and incidents are treated, one might wish that such problems, for instance, as the Destroyer Deal and the incident of The Altmark had been included. But the chief value of the work is to bring together in a usable volume the main body of principles and illustrative materials on the naval aspects of international law. The style is lucid and direct, which would make it adaptable as a text were it not for the fact that the American price, as reported through retail sources, makes it prohibitive in the United States. Unfortunately this will give the book a very limited distribution in this country, but certainly anyone who has occasion to specialize in this branch of study will want a copy at hand for ready reference.

LIONEL H. LAING

The Blockade of Germany After the Armistice, 1918-1919. Selected Documents of the Supreme Economic Council, Superior Blockade Council, American Relief Administration, and Other Wartime Organizations. Selected and edited by Suda Lorena Bane and Ralph Haswell Lutz. Stanford University: Stanford University Press, 1942, pp. viii, 874. Index. \$6.00.

As the specter of bitter warfare again approaches the center of Europe the prospects for continent-wide disorganization and hunger come closer to the awful picture of 1918-1919 when 380 million people suffered from various degrees of food shortages and when over 200 million people were in the throes of social disorder. Due to the deterioration of Germany's wartime distribution and rationing machinery after the collapse of her economic organization

during the revolutionary days the "suffering of the German children, women, and men, with the exception of farmers and rich hoarders, was greater under the continued blockade than prior to the Armistice" (p. v), with profound results on her political development. The Allied blockade was not lifted until July 1, 1919, despite the fact that, to quote Mr. Herbert Hoover, the "American authorities fought that blockade from the day of the armistice" (p. 565), both for humanitarian reasons and because it increased the vulnerability of governments to the dangers of anarchy and bolshevism.

The carefully selected and edited documents included in this selection are arranged chronologically under the three headings of Blockade, Censorship, and Public Opinion (this section includes 180 pages of American, British, neutral and enemy press comment, from 1918-1919). These documents of twenty-five years ago, which read like current history, show vividly the likelihood of two early post-war dangers which should be seen and studied together. They are, on the one hand, the threat of political disintegration of the vanquished nations, furthered by the lack of food immediately available. On the other side of the picture there is the likelihood of friction and even disunity among the victorious allies, once the pressure of war necessities has been removed, due to divergency of immediate aims and the absence of long-range coördination mapped out and agreed upon in advance. It is hoped that the lessons of these pages will be learned and applied while there is still time.

The value of the collection is enhanced by a careful index and the "Notes on Allied Organizations" (pp. 809-44) connected with the food effort, which explain their set-up and functions.

JOHN BROWN MASON

The Tragedy of European Labor, 1918-1939. By Adolf Sturmthal. New York: Columbia University Press, 1943. pp. xii, 389. Bibliographical Notes. Index. \$3.50.

This is a penetrating analysis of the rôle of labor in the European national and international party struggle between two wars, and an essay at predicting its part in the peace to come. The author was a close observer of the labor movements in Western Europe when the rising tide of Fascism and Nazism rapidly submerged the Social Democratic organizations. He examines, somewhat discursively, the progressive deterioration of labor's power in Germany, Great Britain, France, Italy, Austria, and Spain, proposing the general thesis that it was mainly due to the narrow "pressure-group mentality" of labor leaders and their unwillingness or incapacity, when confronted with the responsibility of governing a nation, to act "in the interest of the whole society into which particular interests are to be integrated." Sweden is the conspicuous exception, since there the Social Democratic party "became one of the pioneers in constructive Socialist reformism," a characteristic it shared "to a certain extent with the Viennese Social Democrats." In the conclusion he holds out some hope for more positive

leadership by labor in the post-war era, depending upon the fruition of the obscure underground movements, the extent to which the factory with its working-class groups becomes "the nucleus of a future organized society," the condition of the Washington-London-Moscow triangle after victory, and the kind of influence that is brought to bear from each of these capitals on European workers.

Some of the questions that rise in the mind of the reviewer as he reads this book are these: If organized labor generally failed yesterday, as the author asserts, to act with political maturity, on what grounds may we expect it to succeed tomorrow? Assuming that the toiling masses can improve their position only by political action, is a party led by organized labor leaders the most promising instrument, and should labor attempt to assume the power to govern through winning the highest offices of the State? If not, then how can labor's ends be achieved short of this supreme power and responsibility? Do the author's strictures upon "pressure-group" thinking mean that he rejects the principles of compromise and the balance of group interests, and if so, does he propose that a labor party should speak for all groups and interests? Can a labor party as such really perform such an integral function? Can labor's share in the power to govern not be achieved more readily by making the most statesmanlike use of its opportunities in the realm of private as well as of public government? Or must we contemplate the rise of a new collectivism that will submerge all privately governed sectors?

This study is a timely one. Those who make the peace settlements need to be familiar with the picture it presents, and to come to grips with the thorny problems it raises.

JAMES J. ROBBINS

Europe and Italy's Acquisition of Libya, 1911-1912. By William C. Askew. Durham: Duke University Press, 1942. pp. xi, 317. Bibliography. Index. \$3.50.

In certain respects Italy's nefarious adventure in Ethiopia was modeled upon her previous imperialistic enterprise in Cyrenaica and Tripolitania. Both were dictated by the same motives of greed for territorial expansion at the expense of weaker powers and the pretexts in both cases were of the flimsiest. Finally, both were of vital concern to the great powers of Europe; it was these powers that settled temporarily the Libyan venture and it will be some combination of the same powers that will make the final decision for the two areas in the future.

The importance of the rôle of Europe in this study is far greater than that of Italy and Turkey. It is a noteworthy fact that the policy of appeasement so evident in the democratic states in the years 1935-1936 was similarly apparent in 1911, only at that time all Europe was tarred with the same brush. Public opinion as shown by the press swallowed the same appeals to the emotions for the same reasons. This statement of the semi-official

Tribuna on September 22, 1911, might well have appeared in Gayda's publication a quarter century later, with the change of a single proper noun: "A nation like an individual, does not live by bread alone; the honor of the flag, the reputation of its army count for something. . . . Today we find it necessary to occupy Tripoli in order to preserve our prestige abroad and in our own eyes. . . ."

One remarkable change in personal attitude, however, should be noted in passing. One of the most bitter denunciations of the Libyan war came from the Socialist Mussolini, who declared: "Every honest Socialist must disapprove of this Libyan venture. It means only useless and stupid bloodshed."

Professor Askew has given a vivid picture of the seamy side of diplomacy, which the official documents when finally published so often disclose. The student of international law will be particularly interested in the background of the *Carthage* and *Manouba* incidents and the chapter devoted to the Straits question.

GRAHAM STUART

Towards an Abiding Peace. By Robert M. MacIver. New York: The Macmillan Company, 1943. pp. 195. \$2.50.

The virtue of this book lies in an excellent statement of principles grounded in MacIver's general social theory and expressed forcefully and lucidly for "the ordinary reader." MacIver claims that, fundamentally, the only price of peace is the psychological price involved in reversing traditional attitudes and accepting new institutions. He argues boldly that, in the absence of an effective international community and international enforcement, international law simply does not now exist. He insists that an effective international community can be built only if immediately at the end of the war the victorious peoples forego a punitive peace and prepare to treat their former enemies as fellow human beings and to join with them in post-war organization. The arguments which support this last thesis seem to the reviewer worthy of much more extended treatment. However, a large part of the book is devoted to a discussion of specific policies and machinery—a rather sketchy discussion which gives an unintended impression that some problems are simpler than they are. Several of the specific recommendations are scarcely likely to be accepted in our time even should the postulated psychological revolution occur: *e.g.*, complete national disarmament; the gradual transfer of all colonies to the control of an international commission; the internationalization of the Panama and Suez Canals, the Straits of Gibraltar, and the Dardanelles. Other recommendations are more debatable than MacIver seems to acknowledge: *e.g.*, a very short armistice period; the popular election of representatives to an international legislature. MacIver is most convincing when he speaks as a social psychologist; he is particularly impressive in his analysis of the importance of national economic stability as a basis for peaceful international policy, his

suggested principles for the solution of boundary problems, and his cogent discussion of the impossibility of democratic reëducation from without.

JOHN D. LEWIS

Post-War Reconstruction Conferences. By W. O'Davoren, Geneva: Alexandre Jullien, 1942. pp. xi, 166. Index. Sw. fr. 6.

From the title of Mr. O'Davoren's book one would expect to find a programme of work for post-war reconstruction through the medium of international conferences. In reality, however, it proceeds to outline the practical organization and functioning of international public conferences that were held during the period between the end of World War I and the beginning of World War II. In this connection it may be said that Mr. O'Davoren is eminently qualified for the task. In his capacity as an official of the International Labor Conference during many years he has had an exceptionally wide and rich experience. He describes the careful preparation which is needed to assure the success of any international conference, paying special attention to such questions as the drafting of the provisional agenda, the form and content of letters of invitation, the choice of the date and place of the conference and the organization of the secretariat. He further describes the functions of a conference from its first meeting to its closing scenes, giving details concerning the credentials of delegates, the chair, the committees and their work, the use of foreign languages, the rules of procedure and the rôle of the Secretariat.

Mr. O'Davoren has added a colorful chapter concerning the social side of international conferences. As an official of the International Labor Office it is quite natural that he should seek to emphasize the preparation and functions of the International Labor Conferences and incidentally of the Assembly of the League, leaving out the organization and functions of the numerous *ad hoc* conferences held under the auspices of the League during the period of 1919-1939. Making this slight reservation, Mr. O'Davoren's treatise is an excellent and useful contribution to the study of international public conferences.

VLADIMIR D. PASTHOV

Documents on International Affairs, 1938. Volume I. Edited by Monica Curtis. London, New York, Toronto: Oxford University Press, 1942. pp. xvii, 518. \$10.00.

This publication of the Royal Institute of International Affairs, which appeared annually to accompany and supplement the Survey of International Affairs, published under the same auspices, was interrupted by the outbreak of war. Students of international problems will be delighted to learn that the publication of these interesting and important volumes has been resumed.

1938, the year of Munich, was of great importance internationally, and it is

not surprising that it has been found necessary to divide the "Documents" of that year between two volumes. The present volume "deals largely with the endeavor . . . to avert war by the policy known as appeasement and with the almost equally unsuccessful endeavor to stem the threatening advance of the Totalitarian Powers by a system of alliances or agreements." It contains in addition documents on the Far East and the Americas and on certain general matters, notably economic problems, refugees and naval armaments. The United Kingdom and matters of direct interest to the United Kingdom occupy a prominent place in this volume but that is natural enough in a book of this kind published in London. It is significant of this period, however, that the Soviet Union could be disposed of in twelve pages.

The second volume which (will appear later) will contain the documents relating to Germany and her neighbours and the Munich Crisis.

NORMAN A. M. MACKENZIE

The Government of French North Africa. By Herbert J. Liebesny. With Introduction by H. A. Wieschhoff. Philadelphia: University of Pennsylvania Press, 1943. pp. 130. Appendix. \$1.50.

This pamphlet is the first of a series entitled *African Handbooks* undertaken by the African section of the University Museum of the University of Pennsylvania in conjunction with the Committee on African Studies. The author has succeeded in presenting in condensed form the administrative and juristic structures which characterize the three French territories of North Africa and differentiate between them. To our knowledge, there does not exist at the present time a French work which offers such a complete documentation on the legal and administrative peculiarities of Tunisia, Algeria, and Morocco in such clear and concise form. The author has been especially careful to avoid making any commentary or give personal opinions; he has limited himself to an objective description of existing institutions.

It might have been interesting to include in the description of North African governmental systems mention of the participation of the Moroccan Government in certain public utility enterprises: direct participation (as in the Office of Phosphates) or indirectly as *commanditaire* (joint-stock holder, as in railroads and electricity) or *actionnaire* (stockholder, as in the mining industry). The author has also neglected to show the importance of the organization of the Bank of Morocco. This institution is at the same time both a private and a public enterprise and is a perfect example of mixed economy which, in overriding national boundaries, brings about an international coöperation whose importance for the future has very rightly been pointed out.

Contrary to the attitude taken by the author Mr. Wieschhoff, in his introduction, takes a very definite stand on certain French problems in North Africa, expressing the hope that "the new France will give due consideration to the legitimate aspirations of those who, as colonial subjects of France, have

so greatly contributed to the welfare of European France." Mr. Wieschhoff discusses the situation of the Italian minority in Tunisia and the distressing problem of the Arab majority, which, in the three countries of Tunisia, Algeria, and Morocco represents a total population of more than fourteen million. There exists today a situation the solution of which is not provided by the abrogation of the Crémieux decree. On the contrary, the solution lies in the reestablishment of this decree and the adoption of more progressive measures in favor of the Arabs such as those recently taken by the French Committee of National Liberation. Unquestionably the French Government did not succeed in finding a solution to the Arab problem in these three countries before the war. It will be up to future officials to prove their governmental capacities by issuing orders which will safeguard the interests of all the parties involved.

Thanks to the objective study of Mr. Liebesny, the Anglo-Saxon world will become acquainted with the technical side of the problem.

PAUL JACOB

Trading with the Enemy in World War II. By Martin Domke. New York: Central Book Company, 1943. pp. xv, 640. Appendixes. Indexes. \$10.00.

This study, by a former member of the German bar, of the status of alien enemies and certain incidents of economic warfare, consists of 381 pages of text, 160 pages of appendixes, and nearly 100 pages of indexes. The text is about equally divided between the tests of enemy character and the measures adopted by various authorities, including those of the Axis Powers and several of the governments-in-exile, for the control of transactions which might affect the prosecution of the war. The discussion is profusely illustrated by summaries of judicial decisions, principally by American courts, and the author's exhaustive researches are reflected in numerous citations of pertinent books and articles. The checking of the description of the measures adopted by the Allies is facilitated by the inclusion, in appendixes, of the texts of our Trading with the Enemy Act as amended up to May 1, 1943; our First War Powers Act, 1941; the Executive Orders of April 10, 1940, and March 11, 1942, as amended, establishing American control of foreign funds and defining the functions of our Alien Property Custodian, and the Regulations issued under these orders; President Roosevelt's Proclamation of July 17, 1941, authorizing a list of blocked nationals and controlling certain exports; the General License issued by President Roosevelt on December 13, 1941; the significant General Rulings of our Treasury Department numbered 11, 12, and 12A; a specimen of a Vesting Order of our Alien Property Custodian; the United Kingdom Trading with the Enemy Act, 1939, and Defence Regulations, 1940, as amended; the Canadian, New Zealand, and South African Regulations for the emergency; and the Australian Trading with the Enemy Act, 1939-40. The usefulness of the book for reference

is enhanced by tables of statutes, regulations, and cases and by a subject-index which alone runs to more than 60 pages.

The subject and its treatment by Dr. Domke lie primarily in the field of comparative municipal law, and the book will appeal chiefly to lawyers in municipal practice. The student or practitioner of international law will, however, find much of value and interest in the chapters on Patents, Trade-marks, and Copyrights; Foreign Exchange Control; and Administration of National Assets Abroad by Governments-in-Exile. EDGAR TURLINGTON

BRIEFER NOTICES

Canada at the Paris Peace Conference. By G. P. de T. Glazebrook. London, Toronto, New York: Oxford University Press, 1942. pp. vii, 156. Appendices Index. \$2.00. This is the succinct story of a principal episode in the transformation of Empire into Commonwealth and the development of "dominion status." Throughout the Paris Conference Canada, in the dual rôle of small nation and senior British Dominion, made status its most consistent purpose. But, while this somewhat unedifying objective was its constant star, the Canadian delegation was able to render general service on important commissions, and the conclusion is justified that Borden, Canadian premier, took a part which, in its prominence and creativeness, was out of proportion to his country's importance. Professor Glazebrook has done a useful job.

P. E. CORBETT

Las quiebras en el Congreso de Montevideo 1939/1940. By José Maria Videla Aranguren. Buenos Aires: Imprenta de la Universidad, 1943. pp. 46.

Of the twenty treaties now in force dealing with conflicts which arise when a bankrupt has assets in more than one country, the Treaty of Montevideo, of 1889, on International Commercial Law, ratified by Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay, is one of the oldest. A revision of this treaty took place at the Second Congress of Montevideo, in 1939-1940. In the present monograph (*Bankruptcy at the Montevideo Congress 1939/1940*) Dr. Videla of the University of Buenos Aires deals with this revision and gives a commentary of the bankruptcy provisions in the new Treaty of 1940 on International Commercial Terrestrial Law (this JOURNAL, Vol. 37 (1943), Supp., pp. 132, 138). The analysis of the Treaty provisions is exhaustive and its value enhanced by a comparison of the rules with those in the Bustamante Code of Private International Law. The author's criticisms are sound. He disapproves, like other prominent Argentine jurists, of the new provision which gives priority rights on local assets to local creditors even in the case of a single bankruptcy administration. As is well known, local priority rules endangering the rights of foreign creditors are still in force in several South American countries. The monograph is indispensable for the study of the new bankruptcy treaty and a contribution to the science of the law in this important, but neglected, field of international law.

KURT H. NADELMANN

The Origins and Background of the Second World War. By C. Grove Haines and Ross J. S. Hoffman. New York: Oxford University Press, 1943. pp. 659. Index. \$3.25. "No one who has studied history deeply," say Professors Haines and Hoffman (of Syracuse and Fordham Universities respectively), "will fancy it possible at this hour to write definitively about

the origins of the present world war." This verdict is overly modest, since the authors have done justice to their subject—if not "definitively," then at least lucidly, suggestively, and even brilliantly. This is not a detailed and documented diplomatic history. Only 150 of its pages deal with the period since Munich. But it may well come to be regarded as the best-balanced and best-written survey which has yet appeared of the epoch between the assassination at Sarajevo and the Allied landings in North Africa. In fifteen chapters, each with a useful annotated bibliography, the story is told of the breakdown of order and law in the world community and the triumph of power politics and international anarchy on a global scale. There are sixteen excellent maps, most of them taken from *The War in Maps*, by Brown and Herlin. The style is exceptionally readable. The facts are accurate, well-ordered, and astonishingly complete. The interpretations are often provocative. The evaluations of people, policies, and events are remarkably judicious. And the forest is never lost sight of because of the trees. Some readers may wish that more space had been given to international law and organization. But the authors prefer to view the world's agony in broader terms as a social and spiritual crisis in the very soul of Western civilization.

This volume is more than an admirable textbook. The shocking tale which these pages tell so well deserves to be read and reread and pondered over by scholars and laymen, by soldiers and civilians, by students and statesmen. For there can be no hope of curing the violently destructive convulsions of the world society unless the sources of disorder, lawlessness and fear are comprehended more clearly and dealt with more realistically than was the case during the heartbreaking years of the long armistice. Tomorrow's hopes are imperilled by today's preoccupation with the exigencies and the expediciencies of the moment to the exclusion of perspective on the whole tragic pattern of human destiny during the past three decades. "Without vision, the people perish." To the attainment of vision, Drs. Hoffman and Haines have made a notable contribution.

FREDERICK L. SCHUMAN

Le Droit Raciste a L'Assaut de la Civilisation. By Ernest Hamburger and others. New York: *Éditions de la Maison Française*, Inc., 1943. pp. 137. This is the second publication issued by the Institute of Comparative Law, which, at the *École Libre des Hautes Études* in New York, continues its program begun in Paris. Ernest Hamburger, its Secretary General, writes on "The Extermination of German Jews by the Hitler Régime"; Max Gottschalk on "Racist Legislation in Comparative Law"; Paul Jacob on "Application of Racist Law in France"; and Jacques Maritain (philosopher and President of the School) on "Racist Law and the True Significance of Racism." The volume accords with the doctrine of the school set forth in the Preface, in that it deals with "facts" rather than "norms," and is concerned with the functioning of legal rules rather than with such rules themselves. Max Gottschalk's contribution comes nearest to being an actual analysis of "racist" laws in the different countries subject to Nazi influence. It is significant to note how these laws attach varying consequences to varying circumstances, and to reflect how the legal technique employed resembles that of our laws on nationality and administration of alien enemy property. The late Dean Wigmore, in the last article written before his death, discussed certain statutes which make American citizenship depend, in some instances, upon matters of race.

EDWARD DUMBAULD

Political Refugees in Ancient Greece. By Elemér Balogh, with the collaboration of F. M. Heichelheim. Johannesburg: Witwatersrand University Press, 1943. pp. xvi, 134. Index. 7/6. This brochure is the first part of a comprehensive investigation of the refugee problem which the author planned to cover the middle ages and modern as well as ancient times, but lack of access to European libraries forced him to abandon the larger study. As Dr. Balogh states, there have been refugees from time immemorial and history can teach much on the subject to students of comparative law. Except for the chapter on the repatriation of political refugees in Ancient Greece, including the restoration of their property rights, the practices of banishment and expulsion here recorded as the punishment for crime and subversive political activities, involving in some cases violations of religious precepts, do not appear to be analogous to modern persecutions to force mass migrations under the pretense of racial ideologies. The book is a concise summary of incidents and practices, with over forty pages of notes, which should be of interest and value to all students of the history of law.

GEORGE A. FINCH

Outlines of the Future. By Henri Bonnet. Chicago: World Citizens Association, 1943. pp. vii, 128. \$.25. This is the third study by the author of United Nations organization. Starting with a description of the present machinery of coöperation among the United Nations, M. Bonnet goes on to show its possible lines of development as the war progresses and its ultimate adaptation to the needs of peace in the post-war world. Special emphasis is given to the advantages of continuing existing organization when the war is over instead of building anew. The author advocates the immediate creation of a United Nations Council to direct the conduct of the war now and to make the transition to peace after the war.

NORMAN HILL

The Policy of Neutrality and the Practical Alternative. By A. J. Jacobs. Capetown: Cape Times Ltd., 1943. pp. 320. "This essay," says the foreword, "is the outcome of much quiet thought extending over the greater part of a lifetime upon the threefold problem of security, peace and justice for nations. It is no learned treatise." It is, in fact, the thoughtful and natural reasoning of a sincere man. There were once sound reasons for neutrality, says the author, but interdependence has created such dangers for non-belligerents as will compel them to resort to collective, armed restraint of aggression, and this can only be done by voluntary collective action. It is a mistake to expect each nation to sign away in advance its freedom of decision. The procedure suggested by the author is: "At the first appearance of danger an immediate diplomatic exchange of views among the powers will be initiated by any one of them, and, provided that a sufficiently powerful group of states are found willing to participate, they will make a joint declaration, publicly or otherwise, that if the threatened attack should be made without in their view having been provoked, it will be treated as an act of war against themselves and will meet with their armed resistance." The remainder of the book is an argument for this viewpoint, reasonably presented, but not convincing to this reviewer.

CLYDE EAGLETON

History of the Latin American Nations. By William Spence Robertson. New York: D. Appleton-Century Co., 1943 (3rd Edition). pp. xix, 560. Maps. Index. \$4.00. This scholarly study of the Latin American nations has long been a standard text in the field. Professor Robertson surveys the Latin American people not only politically but from the economic, social, and

intellectual point of view. The present edition has brought the material up to date and given a condensed but wholly adequate account of the twenty republics to the South. The volume may be particularly commended for the numerous and well prepared maps and graphs and also for the well selected bibliographical aids. With the developing interest in Latin America and the many popular and often inaccurate accounts which are appearing it is most desirable that standard works like this of Professor Robertson be kept up to date and available both to students and the general public.

GRAHAM STUART

Official Publications of Present-day Germany. Government, Corporate Organizations and the National Socialist Party. With an Outline of the Governmental Structure of Germany. By Otto Neuburger. (Washington: Government Printing Office, 1942. pp. vi, 130. Index. \$.20.) The author, for many years an official in the municipal administration of Munich, and now associated with the Library of Congress, presents a detailed list of the official publications of Germany, an outline of the structure of its government, and, in addition, a short but plastic picture of the National Socialist German Labor Party. He properly includes the latter subject since, pursuant to the law of December 1, 1933, party and state are a unity inseparably connected and interwoven. Reference to, and consideration of, a number of other laws would have contributed to a more complete understanding of the legal transformation of the Weimar Republic into the totalitarian state. Such were the law for the defense of internal order (*Gesetz zur Gewährleistung des Rechtsfriedens*) of October 13, 1933 (*RGBl.* I, p. 723), a penal law imposing heavy penalties, even the death penalty, for acts against the state or the *NSDAP* or their officials, and the law regarding the transfer of jurisdiction to the Reich (*Gesetz zur Überleitung der Rechtspflege auf das Reich*), of February 16, 1934 (*RGBl.* I, p. 91), the first of a series of laws and decrees eliminating the jurisdiction of the German states. The book has an index in the German language. It is suggested that an additional index in the English language would have considerably enhanced its practical usefulness. Aside from these omissions, the book is as perfect as may be expected under present circumstances which necessitate some incompleteness. It is indispensable for everyone who desires thorough information regarding questions covering Nazi Germany. It will prove invaluable for post-war planning and for the preparation of research work regarding German institutions and the legal and administrative treatment of the territories now occupied by Germany.

HENRY MAYER

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WILBUR S. FINCH

INDEX

[Abbreviations: *BR*, book review; *BN*, book note; *CN*, current note; *Ed*, editorial comment; *JD*, Judicial decision; *LA*, leading article.]

- Abend, Hallet. Pacific Charter. *BN*. 552.
- Aguilar *v.* Standard Oil Co. of New Jersey. 318 U. S. 724. *JD*, 677.
- Alfaro, Ricardo J. *BR*: Whitaker, 358.
- Aliens:
- Duties of Alien Property Custodian. O. C. Sommerich. *LA*. 65.
 - Enemy, Status of in World War II. M. Domke. *BR*. 704.
 - Enemy. Treatment of. R. R. Wilson. *LA*. 30.
 - Enemy. Treatment of property of. M. B. Carroll. *LA*. 611.
 - Internment of, in U. S. R. R. Wilson. *LA*. 42.
 - Nationalization of Enemy Patents. E. Borchard. *Ed*. 92.
 - Regulation of Alien Property. O. C. Sommerich. *LA*. 58.
 - Seamen's Rights. A. W. Knauth. *LA*. 74.
- Allen, Edward A. Work of the International and Comparative Law Section of the American Bar Association. *CN*. 660.
- All Union Chartering Co. *v.* S. S. Kotkas. 1941 A.M.C. 555. Cited, 587.
- Ambassadors, Conference of. G. P. Pink. *BN*. 194.
- American Bar Association. Work of Section on International and Comparative Law. E. A. Allen. *CN*. 660.
- American Republics:
- Collaboration of, in Law and Legislation. S. K. Kuhn. *Ed*. 644.
 - Conference on Treatment of Enemy Property. M. B. Carroll. *LA*. 623.
 - History of. W. S. Robertson. *BN*. 708.
 - Survey of Affairs, 1941. A. P. Whitaker. *BR*. 358.
- American Society of International Law:
- Changes in officers of. G. A. Finch. *Ed*. 631.
 - New classes of membership in. *CN*. 657.
 - Notice of proposed constitutional amendments. *CN*. 327.
 - Thirty-seventh annual meeting. *CN*. 294. G. A. Finch. *CN*. 509.
- Andrews, Fannie Fern. *BN*: Hanna, 196.
- Anglo-International Bank, Ltd., *In re*. 59 Times Law Reports 312. *JD*. 686.
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- Arbitration:
- In Bering Sea Controversy. W. Williams. *LA*. 562.
 - In Union of International Transport by Rail. M. O. Hudson and L. B. Sohn. *LA*. 597.
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- Arno, Huth. Radio Today. *BN*. 365.
- Askew, William C. Italy's Acquisition of Libya, 1911-12. *BR*. 700.
- Atwater, Elton. American Regulation of Arms Exports, *BR*, 178; *BN*: Johnson and Haven, 368.
- Autarchy. In Geopolitik. J. Mattern. *BR*. 186.
- Bailey, Thomas A. Policy of the United States toward the Neutrals, 1917-18. *BR*. 355.
- Baltic Republics. Absorption of, by U.S.S.R. H. W. Briggs. *LA*. 585.

- Balogh, Elemér. Political Refugees in Ancient Greece. *BN*. 707.
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- Belgenland, The. 114 U. S. 355. Cited, 587.
- Belligerent Occupation. International economic law of. E. Feilchenfeld. *BR*. 181.
- Bemis, Samuel Flagg. Diplomatic History of the United States, *BN*, 363; Latin American Policy of the United States, *BR*, 547.
- Beveridge, Sir William. Social Insurance and Allied Services. *BN*. 368.
- Bisschop, W. R. Nationality in International Law. *CN*. 320.
- Blades v. Higgs. 13 C. B. 850. Cited, 577.
- Bonnet, Henri. Outlines of the Future, *BN*, 707; United Nations on the Way, *BR*, 171.
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- Briggs, Herbert W. Non-Recognition in the Courts, *LA*, 585; Settlement of Mexican Claims Act of 1952, *LA*, 222; *BR*: Bailey, 355; Bemis, 547; Callcott, 191.
- Brown, Philip Marshall. Law and Religion, *Ed*, 505; Turkish Institute of International Law, *Ed*, 640; *BN*: Abend, 552; Harris Foundation Lectures, 367; Maritain, 193.
- Brown v. U. S. 5 Ct. Cl. 571. Cited, 637.
- Callahan, J. M. *BN*: Crowe, 364; Miller, 553; Inman, 192.
- Callcott, Wilfrid Hardy. Caribbean Policy of the United States. *BR*. 191.
- Canada:
- At the Paris Peace Conference. G. P. Glazebrook. *BN*. 705.
- Treatment of enemy property by. M. B. Carroll. *LA*. 619.
- Caribbean:
- In International Law of Western Hemisphere. C. Sánchez i Sánchez. *BN*. 193.
- United States Policy in. W. H. Callcott. *BR*. 191.
- Carroll, Mitchell B. Treatment of Enemy Property. *LA*. 611.
- Cartels. International, in steel. E. Hexner. *BR*. 696.
- Chamberlain, Joseph P. *BR*: Hudson, 694.
- Chaplains. With armed forces, status of. R. R. Wilson. *Ed*. 490.
- China:
- Banking and Finance in. F. M. Tamagna. *BR*. 361.
- End of Extraterritoriality in. Q. Wright. *Ed*. 286.
- Christian, John L. Modern Burma. *BN*. 197.
- Chronicle of International Events. Dorothy R. Dart. 133, 328, 513.
- Church v. Hubbard. 2 Cranch 187. Cited, 572.
- Claims. International, lack of judicial organization for settlement of. E. Turlington. *Ed*. 648.
- Cole, G. D. H. Europe, Russia and the Future. *BN*. 197.
- Colombos, C. John. International Law of the Sea. *BR*. 697.
- Commissions, International. Future of. L. A. Mander. *CN*. 126.
- Conciliation. As part of international adjudication procedure. H. Kelsen. *LA*. 397.
- Confiscation. Foreign Funds Control in American Law. B. Hollander. *BR*. 179.
- Conservation. Of marine resources. J. Tomasevich. *BR*. 542.
- Cook v. U. S. 288 U. S. 102. Cited, 211.
- Corbett, P. E. World Order, An Agenda for Lawyers, *LA*, 207; *BN*: Langford, 195; Glazebrook, 705.
- Coudert, Frederic R. Memorial to James Brown Scott, 559; Presidential Address, *CN*, 115.
- Courts, International:
- Compulsory adjudication of international disputes. H. Kelsen. *LA*. 397.
- Development in post-war period. A. K. Kuhn. *Ed*. 276.

- Lack of organization for prompt settlement of individual claims. E. Turlington. *Ed.* 648.
- Regional organization of. C. W. Jenks. *CN.* 314.
- World Court. M. O. Hudson. *BR.* 694.
- Resolutions on postwar establishment of. E. A. Allen. *CN.* 661.
- Cronkhite, Leonard W. *BN:* Christian, 197.
- Crowe, S. E. Berlin West African Conference, 1884-85. *BN.* 364.
- Curtis, Monica. Documents on International Affairs, 1938. *BR.* 702.
- Czechoslovakia. British Declaration of Policy Toward. C. Pergler. *CN.* 310.
- Dallin, David J. Soviet Russia's Foreign Policy, 1939-42. *BR.* 538.
- Danzig. Conquest of. H. L. Leonhardt. *BR.* 184.
- Dart, Dorothy R. Chronicle of International Events. 133, 328, 557, 671.
- De Félice, Theodoré. Gouvernements Nationaux et Accords Internationaux. *BN.* 193.
- Dennis, William C. Memorial to J. S. Reeves. 104.
- Denny, The. 127 F. 2d. 404. Cited, 593.
- Dickinson, Edwin D. Report of Subcommittee of American Bar Association on Punishment of War Criminals. *CN.* 663.
- Dictatorship:
- And international law. S. Schwarzenberger. *BN.* 552.
- Totalitarian, analyzed. S. Neumann. *BR.* 359.
- Doman, Nicholas. The Coming Age of World Control. *BR.* 183.
- Domke, Martin. Trading with the Enemy in World War II. *BR.* 704.
- Dorfalen, Andreas. World of General Haushofer. *BR.* 549.
- Dumbauld, Edward. *BN:* Hamburger, 706.
- Eagleton, Clyde. Punishment of War Criminals by the United Nations, *Ed.* 495; Questions as to the Place of the Individual in the International Law of the Future, *Ed.* 642; *BN:* Jacobs, 707; Wright, 174.
- Ebenstein, William. The Nazi State. *BR.* 548.
- Economic Control. Of enemy alien property. M. B. Carroll. *LA.* 611.
- Emeny, Brooks. *BR:* Leith, Furness and Lewis, 546.
- Enemy Aliens. Resident, right to sue in United States Courts. *Ex parte Kumezo Kawato* (Nov. 9, 1942), *JD.* 336.
- Espionage. Saboteur Cases. C. C. Hyde. *Ed.* 88.
- Estonia. Absorption of, by U.S.S.R. H. W. Briggs. *LA.* 585.
- Europe:
- Diplomatic history of. S. E. Crowe, *BN*, 364; L. Schwartzchild, *BN*, 554.
- Postwar organization of. G. D. H. Cole, *BN*, 197; J. Hanč, *BN*, 198.
- Expatriation. T. I-Mien. *BR.* 540.
- Export Controls. As economic sanctions. B. H. Williams. *LA.* 386.
- Extraterritoriality. In China, ended. Q. Wright. *Ed.* 286.
- Far East. United States responsibilities in postwar organization of. H. Abend. *BN.* 552.
- Fenwick, Charles G. Inter-American Juridical Committee, *LA.* 5; *BN:* Beveridge, 368; Hemleben, 555; Padover, 554; *BR:* Dorfalen, 549; Weigert, 549; Whittlesey, 549.
- Finance:
- In China. F. M. Tamagna. *BR.* 361.
- Law of international obligations. A. D. Schoo. *BR.* 544.
- Finch, George A. Memorial to James Brown Scott, 508; Report of Subcommittee of American Bar Association on Punishment of War Criminals, *CN*, 663; Retribution for War Crimes, *Ed.* 81; Thirty-seventh Annual Meeting of the Society, *CN*, 294, 509; *BN:* Balogh, 707.

Finch, Wilbur S. Periodical Literature of International Law. 204, 372, 557.

Florinsky, Michael T. *BN*: Cole, 197.

Flory, William E. S. Prisoners of War. *BN*. 551.

France:

Colonial Policy of. H. J. Liebesny. 703.

Treatment of Enemy Property by. M. B. Carroll. *LA*. 617.

Fried, Hans Ernest. Guilt of the German Army. *BR*. 188.

Furness, J. W. World Minerals and World Peace. *BR*. 546.

Germany:

And Geopolitics. A. Dorfalen. *BR*. 549.

Blockade of, 1918-19. S. L. Bane and R. H. Lutz. *BR*. 698.

Conquest of Danzig. H. L. Leonhardt. *BR*. 184.

Militarism in. H. E. Fried. *BR*. 188.

National Socialist Ideology and Organization. R. E. Murphy, *et al.* *BR*. 548.

Official Publications on Governmental Structure of. O. Neuburger. *BN*. 708.

Strategy for World Conquest. D. Whittlesey. *BR*. 549.

Treatment of Enemy Property by. M. B. Carroll. *LA*. 615.

Under National Socialism. W. Ebenstein. *BR*. 548.

Glazebrook, G. P. Canada at the Paris Peace Conference. *BN*. 705.

Godshall, Wilson Leon. *BN*: Goodrich, Jones and Myers, 363.

Goodrich, Leland M. Documents on American Foreign Relations, 1942-43. *BN*. 363.

Graham, Malbone W. *BR*: Dallin, 538.

Great Britain:

And the Suez Canal. H. L. Hoskins. *LA*. 373.

Colonial Policy. E. H. Miller, *BN*, 196; V. Thompson, *BN*, 367.

Coöperation with United States. C. C. Hyde. *Ed*. 289.

Foreign Policy. Recent Formulation of. R. V. Langford. *BN*. 195.

In Eastern Asia. L. A. Mills. *BR*. 190.

Policy in Palestine. P. L. Hanna. *BN*. 196.

Trading with Enemy Act. In re Anglo-International Bank, Ltd. 59 Times Law Reports 312. *JD*. 686.

Guerilla warfare. G. G. Wilson. *Ed*. 494.

Hackworth, Green H. Digest of International Law. *BR*. 350.

Haines, C. Grove. Origins and Background of Second World War. *BN*. 705.

Hall, H. Duncan. *BN*: Miller, 196.

Hambro, C. J. How to Win the Peace. *BR*. 357.

Hamburger, Ernest. Le Droit Raciste a l'Assaut de la Civilisation. *BN*. 706.

Hanč, Josef. Eastern Europe and the United States. *BN*. 198.

Hanna, Paul L. British Policy in Palestine. *BN*. 196.

Harley, J. Eugene. *BN*: Peaslee, 365; *BR*: Bonnet, 181; Council on Public Affairs, 189.

Haven, Charles T. For Permanent Victory. *BN*. 368.

Hemleben, Sylvester John. Plans for World Peace through Six Centuries. *BN*. 555.

Hexner, Ervin. International Steel Cartel. *BR*. 696.

Higgins, A. Pearce. International Law of the Sea. *BR*. 697.

Hill, Norman. *BN*: Bonnet, 707.

Hoffman, Ross J. S. Origins of Second World War. *BN*. 705.

deHofmannsthal, E. International Validity of Nevada Divorces. *CN*. 325.

Hollander, Barnett. Confiscation, Aggression and Foreign Funds Control in American Law. *BR*. 179.

Hornbeck, Stanley K. United States and the Far East. *BN*. 195.

Hoskins, Halford L. Suez Canal as an International Waterway. *LA*. 373.

- Hostie, Jan. *BR*: Leonhardt, 184.
- Hudson, Manley O. Arbitration in the Union of International Transport by Rail, *LA*, 567.
Permanent Court of International Justice, *LA*, 1; *BR*, 694; *BN*: Miller, 362; *BL*: Miller, 177.
- Hussari, Gerhart. *BN*: Montagu, 194; Sulzbach, 366; *BR*: Ranshofen-Wertheimer, 182.
- Hyde, Charles Cheney. A Fresh Token of Coöperation with Britain, *Ed*, 289; Aspects of the Saboteur Cases, *Ed*, 88; Japanese Execution of American Aviators, *Ed*, 480; Report of Subcommittee of American Bar Association of Punishment of War Criminals, *CN*, 663; *BL*: Hackworth, 350; Feilchenfeld, 181.
- Mien, Tsiang. Expatriation in America. *BR*. 540.
- Norman, Samuel Guy. Latin America. *BR*. 192.
- Inter-American Bar Association. Meeting of, at Rio de Janeiro, W. R. Vallance, *CN*, 660.
Post-war Plans of, W. R. Vallance, *CN*, 106.
- Inter-American Juridical Committee:
Organization of. C. G. Fenwick. *LA*. 5.
Recommendations on Permanent Court of International Justice, 3.
- International Labor Office. And Reconstruction. *BN*. 200.
- International Law:
Future of. P. B. Potter. *Ed*. 632.
Meeting in England. P. B. Potter. *CN*. 669.
Status of Individual in. C. Eagleton. *Ed*. 642.
Turkish Institute of. P. M. Brown. *Ed*. 640.
Work in, of American Bar Association. E. A. Allen. *CN*. 660.
- International Public Conferences. In League Organization. W. O'Davoren. *BR*. 700.
- Italy:
Acquisition of Libya, 1911-12. W. C. Askew. *BR*. 700.
Life in, under Fascism. R. G. Massock. *BN*. 369.
Prize Courts of. A. P. Sereni. *LA*. 248.
Treatment of Enemy Property by. M. B. Carroll. *LA*. 617.
- Jackson, Robert H. Law Above Nations. *CN*. 297.
- Jacob, Paul. *BR*: Liebesny, 703.
- Jacobs, A. J. The Policy of Neutrality. *BN*. 707.
- Japan:
Execution of American Aviators by. C. C. Hyde. *Ed*. 480.
Treatment of Enemy Property by. M. B. Carroll. *LA*. 618.
- Jenks, C. Wilfred. Inter-American Conference on Social Security. *CN*. 120.
- Johnson, Melvin M. Permanent Victory. *BN*. 368.
- Johnstone, William C. *BR*: Mills, 190.
- Jones, S. Shepard. American Foreign Relations, 1942-43. *BN*. 363.
- Judicial Organization, International. Regionalism in. C. W. Jenks. *CN*. 314.
- Kaufmann, Hans. Die Gutachten des Ständigen Internationalen Gerichtshofes als Mittel zwischenstaatlicher Streitschlichtung. *BR*. 351.
- Kelsen, Hans. Compulsory Adjudication, *LA*, 397; *BR*: Schiffer, 352.
- Keyn Case. 2 Law Rep. 214. Cited, 573.
- Knauth, Arnold W. Alien Seamen's Rights and the War. *LA*. 74.
- Kraiselburd, Elias. Los Tratados de Montevideo y el Derecho Internacional Privado. *BN*. 266.
- Kuhn, Arthur K. Inter-American Collaboration, *Ed*, 644; Postwar Development of International Courts, *Ed*, 276; *BN*: Flory, 551; *BR*: Kaufmann, 351; Nussbaum, 539.
- Kumezo Kawato, Ex Parte. Nov. 9, 1942. *JD*. 336.
- Kunz, Josef L. *BR*: Ebenstein, 548; Mattern, 186; Murphy, *et al.*, 548.

- Labor, European, 1918-39. A. Sturmthal. *BR.* 699.
- Laing, Lionel H. *BN:* MacCormac, 364; *BR:* Higgins and Colombos, 697.
- Langford, R. Victor. British Foreign Policy. *BN.* 195.
- Laserson, Max M. Recognition of Latvia. *LA.* 233.
- Latin America:
- Basis for Hemispheric Organization. S. G. Inman. *BR.* 192.
- History of. W. S. Robertson. *BN.* 707.
- Treatment of Enemy Property by. M. B. Carroll. *LA.* 620.
- Latvia:
- Absorption of, by U.S.S.R. H. W. Briggs. *LA.* 585.
- Recognition of. M. M. Laserson. *LA.* 233.
- League of Nations. Questions of General International Law Before. W. Schiffer. *BR.* 352.
- Leith, C. K. World Minerals and World Peace. *BR.* 546.
- Leonard, L. Larry. *BR:* Tomasevich, 542.
- Leonhardt, Hans L. Nazi Conquest of Danzig. *BR:* 184.
- LeRoy, Howard S. *BN:* Arno, 365.
- Lewis, Cleona. World Minerals and World Peace. *BR.* 546.
- Lewis, John D. *BR:* MacIver, 701.
- Liebesny, Herbert J. Government of French North Africa. *BR.* 703.
- Lithuania. Absorption of, by U.S.S.R. H. W. Briggs. *LA.* 585.
- Lutz, Ralph Haswell. Blockade of Germany, 1918-19. *BR.* 698.
- McConagha, W. A. Labor Movement in Britain, France and Germany. *BN.* 201.
- MacCormac, John. America and World Mastery. *BN.* 364.
- McElroy, Robert. Sanctions. *CN.* 117.
- MacIver, Robert M. Towards an Abiding Peace. *BR.* 701.
- MacKenzie, Norman A. M. *BR:* Curtis, 702.
- Malaya. British Policy in. V. Thompson. *BR.* 367.
- Mallory, Walter H. Political Handbook of the World, 1943. *BN.* 553.
- Mander, Linden A. Future of International Commissions. *CN.* 126.
- Manner, George. Punishment of Criminal Acts of Violence Contrary to the Laws of War. *LA.* 407.
- Marine Resources, International. Agreements on Conservation of. J. Tomasevich. *BR.* 542.
- Maritain, Jacques. Les droits de l'Homme et la Loi Naturelle. *BN.* 193.
- Maritime Law. Survey of. A. P. Higgins and C. J. Colombos. *BR.* 697.
- Marriage. International Validity of Nevada Divorces. E. deHofmannsthal. *CN.* 325.
- Mason, John Brown. *BR:* Bane and Lutz, 698.
- Massock, Richard G. Italy from Within. *BN.* 369.
- Martin, Charles E. *BN:* Pearson, 553; *BR:* Tamagna, 361.
- Mathews, John M. *BN:* Bemis, 363.
- Mattern, Johannes. Geopolitik. *BR.* 186.
- Mayer, Henry. *BN:* Neuburger, 708.
- Merilaid and Co. v. S. S. Kuressaar. 1941 A.M.C. 1190. Cited, 588.
- Mexico:
- Settlement of Claims Act of 1942. H. W. Briggs. *LA.* 222.
- Treatment of Enemy Property by. M. B. Carroll. *LA.* 621.
- Militarism. In German Army. H. E. Fried. *BR.* 188.
- Miller, Eugene H. Strategy at Singapore. *BN.* 196.
- Miller, Hunter. San Juan Archipelago, *BN*, 553; Treaties of the United States, *BR*, 177; *BN*, 362.
- Mills, Lennox A. British Rule in Eastern Asia. *BR.* 190.

- Minerals. Control of Key Resources. C. K. Leith, *et al.* *BR.* 546.
 Minorities. In Wartime. J. P. Shalloo and D. Young. *BR.* 360.
 Montagu, M. F. Ashley. Fallacy of Race. *BN.* 194.
 Montevideo Congress. J. M. Aranguren, *BN*, 705; E. Kraiselburd, *BN*, 366.
 Morgenthau, Hans J. *BR*: Fried, 188.
 Munro, Dana G. *BN*: Sánchez, 193.
 Murdock, James O. New Classes of Membership in the Society. *CN.* 657.
 Murphy, Raymond E. National Socialism. *BR.* 548.
 Myers, Denys P. American Foreign Relations, 1942-43. *BN.* 363.
- Nadelmann, Kurt H. *BN*: Aranguren, 705.
 Narcotics, International Control of. B. A. Renborg. *LA.* 436.
 Nationalism, Psychological Basis of. W. Sulzbach. *BN.* 366.
 Nationality:
 Concept of, in international law. W. R. Bisschop. *CN.* 320.
 Enemy National redefined by Treasury Department. O. C. Sommerich. *LA.* 61.
 Naturalization. Of non-residents, after Conquest. E. Borchard. *Ed.* 634.
 Near East. Harris Foundation Lectures. *BN.* 367.
 Neuburger, Otto. Official Publications of Present-day Germany. *BN.* 708.
 Neumann, Sigmund. Permanent Revolution. *BR.* 359.
 Neutrality:
 Alternatives to. A. J. Jacobs. *BN.* 707.
 Current Questions Relating to. R. R. Wilson. *Ed.* 651.
 U. S. Policy toward Neutrals, 1917-18. T. A. Bailey. *BR.* 355.
 Non-Recognition. By United States, of absorption of Baltic Republics. H. W. Briggs.
 LA. 585.
 Nussbaum, Arthur. Private International Law. *BR.* 539.
- Occupied Territory. Forced Transfer of Property in. L. H. Woolsey. *Ed.* 282.
 O'Davoren, W. Post-war Reconstruction Conferences. *BR.* 702.
 Oppenheimer, F. E. *BN*: Schwarzenberger, 552.
- Padover, Saul K. Wilson's Ideals. *BN.* 554.
 Palestine. British Policy in. P. L. Hanna. *BN.* 196.
 Panama. Executive Agreements Regarding. L. H. Woolsey. *Ed.* 482.
 Pastuhov, Vladimir. *BR*: O'Davoren, 702.
- Peace:
 Foundations of, in Europe. E. Ranshofen-Wertheimer. *BR.* 182.
 Psychological foundations of. R. M. MacIver. *BR.* 701.
 Pearson, James. Reciprocal Trade Agreements Program. *BN.* 553.
 Peaslee, Amos J. Permanent United Nations. *BN.* 365.
 Pergler, Charles. The Munich Repudiation, *CN*, 308; *BN*: Hanč, 198.
 Permanent Court of International Justice. M. O. Hudson. *LA.* 1.
 Pfankuchen, Llewellyn. *BN*: Pink, 194.
 Pink, Gerhard P. Conference of Ambassadors. *BN.* 194.
 Police, International:
 Proposals for, in Postwar World. W. L. Rodgers. *CN.* 308.
 To Organize Postwar Security. Q. Wright. *Ed.* 499.
- Political Geography:
 And Postwar Planning. H. W. Weigert. *BR.* 549.
 Doctrine of National Self-sufficiency and Empire. J. Mattern. *BR.* 186.
 German Theories of. A. Dorfalen. *BR.* 549.
 Political Theory. Natural Law Basis of International Law. J. Maritain. *BN.* 193.

Postwar Problems:

- Development of International Courts. A. K. Kuhn. *Ed.* 276.
- Economic Planning. C. W. Wright (ed.). *BN.* 199.
- Law as a Social Control in International Relations. E. Borchard. *LA.* 46.
- Military Preparedness. M. M. Johnson and C. T. Haven. *BN.* 368.
- Political, Surveyed. C. J. Hambro. *BR.* 357.
- Problems of National Security. Q. Wright. *Ed.* 499.
- Resolutions on, by Inter-American Bar Association. W. R. Vallance. *CN.* 667.
- Social Security. Sir William Beveridge. *BN.* 368.
- Study of, by Inter-American Juridical Committee. 17.
- Potter, Pitman B. Future of International Law, *Ed.* 632; Report on International Law Meeting in England, *CN.* 669; *BR.* Neumann, 359.
- Prisoners of War. Under International Law. W. E. S. Flory. *BN.* 551.
- Private International Law:
 - International Validity of Nevada Divorces. E. deHofmannsthal. *CN.* 325.
 - Principles of. A. Nussbaum. *BR.* 539.
- Prize Courts, Italian. A. P. Sereni. *LA.* 248.
- Property. Forced Transfer of, in Enemy Occupied Territory. L. H. Woolsey. *Ed.* 282.
- y Puente, J. Irizarry. *BN.* Kraiselburd, 366.

Quirin, *et al.*, Ex parte. Original and Nos. 1-7. U. S. Supreme Court. July Special Term, 1942. *JD.* 152.

Racialism:

- And Comparative Law. E. Hamburger, *et al.* *BN.* 706.
- Fallacy of. M. F. Montagu. *BN.* 194.
- Radio. Present Organization and Development of. H. Arno. *BN.* 365.
- Randolph, Bessie C. *BR.* Roosevelt, 172.
- Ranshofen-Wertheimer, Egon. Victory is Not Enough, *BR.* 182; *BR.* Doman, 183.
- Reclamation, International. New Techniques of. E. Turlington. *Ed.* 291.
- Recognition of Latvia. M. M. Laserson. *LA.* 233.
- Reeves, Jesse Siddall. Memorial to. 104.
- Refugees:
 - In Ancient Greece. E. Balogh. *BN.* 707.
 - In Dominican Republic. Brookings Institution Survey. *BR.* 187.
- Regionalism. In International Judicial Organization. C. W. Jenks. *CN.* 314.
- Regulation of Exports. E. Atwater. *BR.* 178.
- Religion and Law. P. M. Brown. *Ed.* 505.
- Renborg, Bertil A. International Control of Narcotic Drugs. *LA.* 436.
- Revolution. Totalitarian, Analyzed. S. Neumann. *BR.* 359.
- Rigmore Case. Supreme Court of Sweden. Stockholm, March 17, 1942. *JD.* 141.
- Robbins, James J. *BR.* Sturmthal, 699.
- Robertson, William Spence. History of the Latin American Nations. *BN.* 707.
- Robinson, Jacob. *BR.* Brookings Survey, 187.
- Rodgers, W. L. An International Police Force. *CN.* 305.
- Roland, Joseph M. National Socialism. *BR.* 548.
- Roosevelt, Franklin Delano. Public Papers. *BR.* 172.
- Rosenman, Samuel I. (ed.). Public Papers of Franklin D. Roosevelt. *BR.* 172.
- Roucek, Joseph S. *BR.* Shalloo and Young, 360.

Sabiedriba *v. The Regent, et al.* 35 F. Suppl. 985. Cited, 586.

Sánchez i Sánchez, Carlos. Los Problemas de la Seguridad Continental. *BN.* 193.

Sanctions:

- Economic, in American Practice. B. H. Williams. *LA*. 386.
 Needed in International Law. R. McElroy. *CN*. 117.
- Schiffer, Walter. Questions of General International Law before the League. *BR*. 352.
- Schoo, Alberto D. Regimen Juridico de las Obligaciones Monetarias Internacionales. *BR*. 544.
- Schuman, Frederick L. *BN*: Haines and Hoffman, 706.
- Schwartzchild, Leopold. World in Trance. *BN*. 554.
- Schwarzenberger, Georg. International Law and Totalitarian Lawlessness, *BN*, 552; *Jus Pacis ac Belli?* *LA*, 460.
- Scott, James Brown. Memorial to, 508, 559.
- Sereni, Angelo Piero. Italian Prize Courts, *LA*, 248; *BN*: Massock, 369; *BR*: Schoo, 544.
- Shalloo, J. P. Minority Peoples in a Nation at War. *BR*. 360.
- Signe, The. 39 F. Supp. 810. Cited, 589.
- Silberberg v. *The Kotkas, et al.* 35 F. Supp. 983. Cited, 585.
- Social Security:
 First Inter-American Conference on. C. W. Jenks. *CN*. 120.
 In Post-war Britain. Sir William Beveridge. *BN*. 368.
- Sohn, Louis B. Arbitration in the Union of International Transport by Rail. *LA*. 597.
- Sommerich, Otto C. New Concepts of Alien Property. *LA*. 58.
- South Africa. Problem of Native Labor in. J. M. Tinley. *BN*. 199.
- State Department, United States, In Wartime. *CN*. 311.
- Stevens, Francis B. National Socialism. *BR*. 548.
- Stowell, Ellery C. *BN*: Mallory, 553.
- Stuart, Graham. *BN*: Robertson, 707; Schwartzchild, 554; *BR*: Anuario de la Sociedad Cubana, 354; Askew, 700.
- Sturmthal, Adolf. Tragedy of European Labor. *BR*. 699.
- Sulzbach, Walter. National Consciousness. *BN*. 366.
- Tamagna, Frank M. Banking and Finance in China. *BR*. 361.
- Taylor, William L. *BN*: McConagha, 201; Tinley, 199.
- Telecommunications. Arbitral Decision on Operations of French Company Radio-Orient in Egypt. *JD*. 341.
- Temple, H. W. Impact of War on America. *BN*. 199.
- Thompson, Virginia. Postmortem on Malaya. *BN*. 367.
- Tiedemann v. *The Signe, et al.* 37 F. Supp. 819. Cited, 588.
- Tinley, J. M. Native Labor Problem in South Africa. *BN*. 199.
- Tomasevich, Jozo. International Agreements on Conservation of Marine Resources. *BR*. 542.
- Treaties. Of the United States. H. Miller. *BR*. 177.
- Trivers, Howard. National Socialism. *BR*. 548.
- Turkey. Institute of International Law, P. M. Brown, *Ed*, 640; Status of, under Treaty of Paris, H. McK. Wood, *LA*, 262.
- Turlington, Edgar. Neglected Phase of International Judicial Organization, *Ed*, 648; New Technique in International Reclamation, *Ed*, 291; *BR*: Domke, 704.
- Union of International Transport by Rail. Arbitration in. M. O. Hudson and L. B. Sohn. *LA*. 597.
- United Nations:
 Organization of, H. Bonnet. *BN*. 707.
 Principles and Policies of. H. Bonnet. *BR*. 181.
- United States:
 And Far East. S. K. Hornbeck. *BN*. 195.

- And Panama. Executive Agreements regarding. L. H. Woolsey. *Ed.* 482.
 Armed Forces. Status of Chaplains in. R. R. Wilson. *Ed.* 490.
 Coöperation with Britain. C. C. Hyde. *Ed.* 289.
 Digest of International Law. G. H. Hackworth. *BR.* 350.
 Diplomatic History of. S. F. Bemis. *BN.* 363.
 Foreign Policy of. J. MacCormac. *BN.* 364.
 Foreign Relations. Documents on, 1942-43, Goodrich, Jones and Myers, *BN.* 363;
 Papers Relating to, *BR.* 178; Paris Peace Conference Papers, *BR.* 535.
 International Law and Practice. J. H. Wigmore. *BR.* 353.
 In World War II. Cornell Faculty. *BN.* 198.
 Occupation of San Juan Island. H. Miller. *BN.* 553.
 Policy toward Neutrals, 1917-18. T. A. Bailey. *BR.* 355.
 Policy in Caribbean. W. H. Calcott. *BR.* 191.
 Policy toward Latin America. S. F. Bemis. *BR.* 547.
 State Department in Wartime. *CN.* 311.
 Trade Agreements Program. J. C. Pearson. *BN.* 553.
 Treaties and other International Acts. H. Miller. *BN.* 362.
 Treaties of. H. Miller. *BR.* 177.
 Treatment of enemy property by. M. B. Carroll. *LA.* 625.
 United States v. Cox. Original and Nos. 1, 2, 3, 4, 5, 6, and 7. U. S. Supreme Court. July
 Special Term, 1942. *JD.* 152.
 United States v. Fullard-Leo, *et al.* 133 F. 2nd. 743. *JD.* 520.
 U.S.S.R. Foreign Policy, 1939-42. D. J. Dallin. *BR.* 538.
- Vallance, William Roy. Meeting of Inter-American Bar Association, *CN.* 666; Postwar
 Plans of the Inter-American Bar Association, *CN.* 106.
 Vandebosch, Amry. *BN:* Thompson, 367.
 Vinacke, Harold M. *BN:* Hornbeck, 195.
- War:
- Forced Transfer of Property in Enemy Occupied Territory. L. H. Woolsey. *Ed.* 282.
 Origins of World War II. C. G. Haines and R. J. S. Hoffman. *BN.* 705.
 Sociology of. G. Schwarzenberger. *LA.* 460.
 State Department in Wartime. *CN.* 311.
 Study of. Q. Wright. *BR.* 174.
- War Criminals:
- Punishment of. G. Manner. *LA.* 407.
 Punishment of, by United Nations. C. Eagleton. *Ed.* 495.
 Report of Subcommittee of American Bar Association. E. D. Dickinson, *et al.* *CN.* 663.
 Resolutions by American Bar Association. E. A. Allen. *CN.* 663.
- Waterways, International. H. L. Hoskins. *LA.* 373.
- Weigert, Hans W. Generals and Geographers. *BR.* 549.
- Whitaker, Arthur P. Survey of Inter-American Affairs, 1941. *BR.* 358.
- Whittlesey, Derwent. German Strategy of World Conquest. *BR.* 549.
- Wigmore, John H. American International Law and Practice. *BR.* 353.
- Wilcox, Francis O. *BN:* De Félice, 193.
- Wild, Payson S. *BR:* Hexner, 696.
- Williams, Benjamin H. Coming of Economic Sanctions into American Practice, *LA.* 386;
BN: Wright, 199.
- Williams, William. Reminiscences of the Bering Sea Arbitration. *LA.* 562.
- Williams v. North Carolina. 317 U. S. 287. Cited, 646.
- Wilson, George Grafton. Control of Aerial Navigation, *Ed.* 91; Guerilla and Lawful Com-
 batant, *Ed.* 494.

- Wilson, Robert R. Current Questions Relating to Neutrality, *Ed*, 651; Status of Chaplains with Armed Forces, *Ed*, 490; Treatment of Civilian Alien Enemies, *LA*, 30; *BR*: Papers on U. S. Foreign Relations, 179; Paris Peace Conference Papers, 535.
- Wood, Hugh McKinnon. Treaty of Paris and Turkey's Status in International Law. *LA*. 262.
- Woolsey, L. H. Executive Agreements Relating to Panama, *Ed*, 482; Forced Transfer of Property in Enemy Occupied Territory, *Ed*, 282; *BR*: Atwater, 178; Wigmore, 353.
- World Order:
- Development of coöperation from United National Organization. H. Bonnet. *BN*. 707.
 - Future of International Law. P. B. Potter. *Ed*. 632.
 - Legal Problems Surveyed. P. E. Corbett. *LA*. 207.
 - Legislative Organization of. T. De Félice. *BN*. 193.
 - Organization of, through League Council on Public Affairs. *BR*. 189.
 - Possible outgrowth of United Nations Organization. A. J. Peaslee. *BN*. 365.
 - Resolutions on Postwar Organization for. *CN*. 295.
 - Resolutions on, of American Bar Association. E. A. Allen. *CN*. 660.
 - Transition to. N. Doman. *BR*. 183.
- World Peace. History of Plans for. S. J. Hemleben. *BN*. 555.
- Wright, Chester W. Economic Problems of War and its Aftermath. *BN*. 199.
- Wright, Quincy. Balance of Power and International Law, *Ed*, 97; End of Extraterritoriality in China, *Ed*, 286; National Security and International Police, *Ed*, 499; Study of War, *BR*, 174; *BR*: Hambro, 357.
- Young, Donald. Minority Peoples in a Nation at War. *BR*. 360.

OFFICIAL DOCUMENTS

CONTENTS

	PAGE
CHINA-GERMANY-ITALY-JAPAN. Declarations of war by China.....	1
GREAT BRITAIN-CZECHOSLOVAKIA. Exchange of notes. <i>Aug. 5, 1942</i>	2
GREAT BRITAIN-UNITED STATES. Agreement on interchange of patent rights, etc. <i>Aug. 24, 1942</i>	4
INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL. <i>Washington, D. C., June 30-July 10, 1942.</i>	
Final Act.....	9
I. Financial and commercial transactions with aggressor nations and nations dominated by them.....	14
II. Financial and commercial transactions with countries outside the Western Hemisphere.....	15
III. Transactions among the American Republics.....	16
IV. Control of movement and transfer of securities.....	16
V. Standards for the application of financial and economic controls within the American Republics.....	17
VI. Standards of effective blocking.....	17
VII. Control of business enterprises.....	18
VIII. Reciprocal coöperation among the American Republics.....	19
IX. Vote of thanks.....	20
INTER-AMERICAN JURIDICAL COMMITTEE. Reaffirmation of fundamental principles of international law. <i>Rio de Janeiro, June 2, 1942</i>	21
INTERNATIONAL TRADE IN WHEAT. <i>Washington, D. C., April 22, 1942.</i>	
Memorandum of agreement.....	24
Draft convention.....	26
Minutes of the Final Session.....	40
UNITED STATES:	
An Act to provide for the expeditious naturalization of former citizens who served or are serving with allied forces. <i>April 2, 1942</i>	41
Foreign Agents Registration Act. <i>April 29, 1942</i>	42
Proclamation regarding Alien Enemies. <i>Jan 14, 1942</i>	54

OFFICIAL DOCUMENTS

CONTENTS

	PAGE
CHINA-GREAT BRITAIN. Treaty for relinquishment of extraterritorial rights. <i>Jan. 11, 1943</i>	57
Exchange of notes.....	62
Agreed minute.....	65
CHINA-UNITED STATES. Treaty for relinquishment of extraterritorial rights. <i>Jan. 11, 1943</i>	65
Exchange of notes.....	69
GREAT BRITAIN-UNITED STATES. Agreement regarding problems of marine transportation and litigation. <i>Dec. 4, 1942</i>	71
Exchange of notes.....	74
INTER-AMERICAN CONFERENCE OF POLICE AND JUDICIAL AUTHORITIES. <i>May 27-June 9, 1942</i> . Final Act.....	75
I. Resolution relative to propaganda by public demonstrations.....	77
II. Resolution relative to propaganda in educational institutions.....	78
III. Recommendation relative to associations.....	78
IV. Resolution relative to fishing vessels.....	79
V. Recommendation on subversive activities and special police unit.....	79
VI. Recommendation relative to uniform penal law.....	81
VII. Recommendation relative to fraudulent citizenship.....	81
VIII. Resolution concerning the granting of citizenship.....	81
IX. Recommendation relative to Treaty on Criminal Law of 1940.....	82
X. Recommendation on extradition.....	82
XI. Resolution on draft convention relative to expulsion of aliens.....	82
XII. Resolution on special travel documents.....	82
XIII. Resolution relative to Inter-American Police Union.....	83
XIV. Recommendation on national inter-departmental committees.....	84
Reservations.....	84
LIBERIA-UNITED STATES. Defense agreement. <i>March 31, 1942</i>	85
MEXICO-UNITED STATES. Exchange of notes regarding military service. <i>Jan. 22, 1943</i>	89
UNITED STATES:	
Act to facilitate disposition of prizes. <i>Aug. 18, 1942</i>	90
Proclamation concerning capture of prizes. <i>Jan. 30, 1943</i>	92
Neutrality Act of 1939. Joint resolution amending Sec. 7.....	93

OFFICIAL DOCUMENTS

CONTENTS

	PAGE
UNITED NATIONS CONFERENCE ON FOOD AND AGRICULTURE. Text of the Final Act. <i>June 3, 1943</i>	159
AMERICAN MEXICAN CLAIMS COMMISSION. Regulations relating to claims before the Commission. <i>May 18, 1943</i>	192

CHINA-GERMANY-ITALY-JAPAN

DECLARATIONS OF WAR BY CHINA¹

[Released to the press, December 12, 1941]

DECLARATION OF WAR ON GERMANY AND ITALY

Since the conclusion of the Tripartite Pact in September, 1940, Germany, Italy and Japan have unmistakably banded themselves into a bloc of aggressor states working closely together to carry out their common program of world conquest and domination. To demonstrate their solidarity Germany and Italy successively accorded recognition to Japan's puppet régimes in northeast China and Nanking. As a consequence, China severed diplomatic relations with Germany and Italy last July.

Now the Axis Powers have extended the theatre of aggressive activities and have thrown the whole Pacific region into turmoil making themselves the enemies of international justice and world civilization. This state of affairs can no longer be tolerated by the Chinese Government and people.

The Chinese Government hereby declares that as from midnight of December 9, 1941, a state of war exists between China and Germany and between China and Italy. The Chinese Government further declares that all treaties, conventions, agreements, and contracts concerning relations between China and Germany and between China and Italy are and remain null and void.

DECLARATION OF WAR ON JAPAN

Japan's national policy has always aimed at the domination of Asia and the mastery of the Pacific. For more than four years, China has resolutely resisted Japan's aggression regardless of suffering and sacrifice in order not only to maintain her national independence and freedom, but also to uphold international law and justice and to promote world peace and human happiness.

China is a peace-loving nation. In taking up arms in self-defense, China entertained the hope that Japan might yet realize the futility of her plan of conquest. Throughout the struggle all other Powers have shown utmost forbearance likewise in the hope that Japan might one day repent and mend her ways in the interest of peace in the entire Pacific region.

Unfortunately Japan's aggressive propensities have proven to be incorrigible. After a long and fruitless attempt to conquer China, Japan, far from showing any sign of penitence, has treacherously launched an attack on China's friends, the United States of America and Great Britain, thus extending the theatre of aggressive activities and making herself an arch

¹ Department of State Bulletin, Dec. 13, 1941, Vol. 5, p. 506.

enemy of justice and world peace. This latest act of aggression on the part of Japan lays bare her insatiable ambition and has created a situation which no nation that believes in international good faith and human decency can tolerate.

The Chinese Government hereby formally declares war on Japan. The Chinese Government further declares that all treaties, conventions, agreements and contracts concerning the relations between China and Japan are and remain null and void.

GREAT BRITAIN-CZECHOSLOVAKIA

EXCHANGE OF NOTES CONCERNING THE POLICY OF GREAT BRITAIN IN REGARD TO CZECHOSLOVAKIA¹

Mr. Anthony Eden to M. Masaryk

FOREIGN OFFICE, LONDON, August 5, 1942

Your Excellency,

In the light of recent exchanges of view between our Governments, I think it may be useful for me to make the following statement about the attitude of His Majesty's Government in the United Kingdom as regards Czechoslovakia:

In my letter of the 18th July, 1941, I informed your Excellency that The King had decided to accredit an Envoy Extraordinary and Minister Plenipotentiary to Dr. Beneš as President of the Czechoslovak Republic. I explained that this decision implied that His Majesty's Government in the United Kingdom regarded the juridical position of the President and Government of the Czechoslovak Republic as identical with that of the other Allied heads of States and Governments established in this country. The status of His Majesty's representative has recently been raised to that of an ambassador.

The Prime Minister had already stated in a message broadcast to the Czechoslovak people on the 30th September, 1940, the attitude of His Majesty's Government in regard to the arrangements reached at Munich in 1938. Mr. Churchill then said that the Munich Agreement had been destroyed by the Germans. This statement was formally communicated to Dr. Beneš on the 11th November, 1940.

The foregoing statement and formal act of recognition have guided the policy of His Majesty's Government in regard to Czechoslovakia, but in order to avoid any possible misunderstanding, I desire to declare on behalf of His Majesty's Government in the United Kingdom that as Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938, in which His Majesty's Government in the United Kingdom participated, His Majesty's Government regard themselves as free from any engagements in this respect. At the final settlement of the Czechoslovak

¹ Great Britain, Treaty Series No. 3 (1942). Cmd. 6379.

frontiers to be reached at the end of the war they will not be influenced by any changes effected in and since 1938.

I have, etc.

ANTHONY EDEN

M. Masaryk to Mr. Anthony Eden

5th August, 1942

Your Excellency,

I have the honor to acknowledge the receipt of your note of the 5th August, 1942, and I avail myself of this opportunity to convey to your Excellency, on behalf of the Czechoslovak Government and of myself, as well as in the name of the whole Czechoslovak people who are at present suffering so terribly under the Nazi yoke, the expression of our warmest thanks.

Your Excellency's note emphasizes the fact that the formal act of recognition has guided the policy of His Majesty's Government in regard to Czechoslovakia, but, in order to avoid any possible misunderstanding, His Majesty's Government now desire to declare that, as Germany has deliberately destroyed the arrangements concerning Czechoslovakia reached in 1938, in which His Majesty's Government in the United Kingdom participated, His Majesty's Government regard themselves as free from any engagements in this respect. At the final settlement of the Czechoslovak frontiers to be reached at the end of the war, they will not be influenced by any changes effected in and since 1938.

My Government accept your Excellency's note as a practical solution of the questions and difficulties of vital importance for Czechoslovakia which emerged between our two countries as the consequence of the Munich Agreement, maintaining, of course, our political and juridical position with regard to the Munich Agreement and the events which followed it as expressed in the note of the Czechoslovak Ministry for Foreign Affairs of the 16th December, 1941. We consider your important note of the 5th August, 1942, as a highly significant act of justice towards Czechoslovakia, and we assure you of our real satisfaction and of our profound gratitude to your great country and nation. Between our two countries the Munich Agreement can now be considered as dead.

I have, etc.

JAN MASARYK

GREAT BRITAIN-UNITED STATES

AGREEMENT ON INTERCHANGE OF PATENT RIGHTS, INFORMATION,
INVENTIONS, DESIGNS, OR PROCESSES¹

Signed at Washington August 24, 1942; effective January 1, 1942

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, in further fulfillment of the policy set forth in their agreement of February 23, 1942, on the principles applying to mutual aid in the prosecution of the war against aggression,² have considered the interchange of patent rights, information, and similar matters, and have authorized their representatives to agree as follows:

ARTICLE I

Each government, in so far as it may lawfully do so, will procure and make available to the other government for use in war production patent rights, information, inventions, designs, or processes requested by the other government. In the case of the United States of America, the law authorizing such procurement and transfer is now the Act of the Congress of the United States approved March 11, 1941 (Public 11, 77th Congress).³ Each government will bear the cost of the procurement of such patent rights, information, inventions, designs, or processes from its own nationals. In this agreement the term "nationals" shall include all corporations and natural persons domiciled, resident, or otherwise within the jurisdiction of the government concerned (as well as the government itself and all of its agencies), except natural persons who are exclusively citizens or subjects of the country of the other government. The basic principle as to which government shall undertake and bear the cost of procurement in doubtful cases shall be decided in accordance with whether dollar or sterling costs are necessarily involved. In the former case the Government of the United States of America will effect acquisition and in the latter case the Government of the United Kingdom will effect acquisition, but each government will pay the remuneration and other expenses of its own representatives incurred in connection with communicating any research or manufacturing information to the other government.

ARTICLE II

All patent rights so acquired shall be acquired and used for the purposes of, and until the termination of, the war only, unless otherwise expressly provided, except that contracts entered into (for the production, use or disposition of articles) which cannot be terminated without penalty, may be completed, and all articles on hand at the termination of the war, or

¹ Executive Agreement Series 268.

² Executive Agreement Series 241; this JOURNAL, Supp., Vol. 36 (1942), p. 170.

³ 55 Stat. 31; this JOURNAL, Supp., Vol. 35 (1941), p. 76.

completed as permitted herein, may be used and disposed of. Information, inventions, designs, or processes so acquired and not covered by patents or patent applications shall be acquired upon such terms as may most expeditiously make such information, inventions, designs, or processes available for the purposes of the war, with provision, to the extent practicable, for the limitation of the use thereof for the purposes of and until the termination of the war. When the information, invention, design, or process is of a category for which the other government requests secrecy upon security grounds, each government will take such steps as it deems practicable to ensure the appropriate degree of secrecy in manufacture and use. The term "termination of the war," for the purposes of this agreement, shall mean the date when the Government of the United States of America and the Government of the United Kingdom have ceased to be jointly engaged in actual hostilities against a common enemy, or such other date as may be mutually agreed upon, and shall not be dependent on the date of the signing of a peace treaty.

ARTICLE III

Such acquisition by the Government of the United States of America will be effected in accordance with regular Lend-Lease procedure (or its then current equivalent) and will be financed under such program, except that other procedure may be used in those instances where no expenditure of funds is necessary.

ARTICLE IV

Such acquisition by the Government of the United Kingdom will be effected on the basis of written requests submitted by any authorized department or agency of the Government of the United States of America to the British Supply Council (or to such other agency of the Government of the United Kingdom as may be designated from time to time). Copies of all such requests will be furnished to the Office of Lend-Lease Administration. The British Supply Council will furnish to that office reports as to all patent rights, information, inventions, designs, or processes obtained and transferred to the agency requesting the same and the acquisition cost thereof, if any.

ARTICLE V

In so far as is found practicable in the circumstances of each case, adequate licenses or assignments and contract rights shall be acquired by each government, in accordance with the requests of the other government, and transferred to the other government. Where desirable each government will sponsor necessary relationships and permit dealings between the original grantor and the ultimate user. It is contemplated that normally the rights obtained should, subject to the limitations contained in Article II of this agreement, among other things, include:

(a) The right to make, to have made, to use, and to dispose of, articles embodying the subject-matter of the patent rights, information, inventions, designs, or processes, so acquired, including the right to use and practice any of the aforesaid.

(b) Provision for securing to the recipient government or its designees all necessary personal expert services and supplementary information.

(c) Permission to transfer, assign, license, or otherwise dispose of, any or all of the rights and privileges acquired, to the other government, with further permission to the latter to transfer, assign, license, or otherwise dispose of any or all of the same to contractors, sub-contractors, or other appropriate designees of the recipient government, for war production purposes only.

(d) The reservation on the part of the acquiring government that it, and parties in interest holding under it, shall have the right at any time to contest the validity of any patent rights acquired.

(e) Whenever practicable, a guarantee by the licensor or patentee as to the validity of his patent, in respect of which the license is granted, with an indemnity against any infringement claims.

(f) Provision for the exchange of information, between the licensor or patentee and ultimate licensee, as to improvements or the results of research on the subject-matter of the license, together with the use of any patents which may be obtained in respect of such improvements, with a further provision that the like information and right to use additional patents shall simultaneously be furnished to both governments.

ARTICLE VI

Subject to the provisos set out in Article VII hereunder, the Government of the United Kingdom agrees and undertakes to indemnify and save harmless the Government of the United States of America against all claims asserted by corporations or subjects of the United Kingdom arising as a result of the use and practice of any patent rights, inventions, information, designs, or processes furnished by the Government of the United Kingdom to the Government of the United States of America and used by the latter government pursuant to the provisions of Article II of this agreement, or arising as a result of production, use, or disposition, by or on behalf of the Government of the United States of America, of articles:

(a) Supplied to the Government of the United Kingdom under Lend-Lease or equivalent procedure; or

(b) Embodying the subject-matter of patent rights, information, inventions, designs, or processes furnished (or which purport to have been furnished) by the Government of the United Kingdom to the Government of the United States of America and used by the Govern-

ment of the United States of America pursuant to the provisions of Article II of this agreement; or

(c) So produced, used, or disposed of, pursuant to a request made or authority given by the Government of the United Kingdom to the Government of the United States of America;

provided always that the Government of the United States of America will, whenever in its judgment practicable, avail itself of any indemnity from a third party of which it shall have the benefit, in lieu of the indemnity from the Government of the United Kingdom contained in this agreement. The Government of the United Kingdom will not look to the Government of the United States of America for any corresponding indemnity against claims asserted by nationals of the United States in the United Kingdom.

ARTICLE VII

The indemnity by the Government of the United Kingdom to the Government of the United States of America shall be subject to the following conditions, namely:

(a) That the Government of the United States of America, as soon as practicable after receiving notice of any claim by which a liability might fall upon the Government of the United Kingdom under the indemnity, will notify the Government of the United Kingdom of such claim having been made.

(b) That the Government of the United States of America will not make any compromise or settlement out of court with any such claimant, without the prior knowledge and concurrence of the Government of the United Kingdom.

(c) That, in all cases in which no prior compromise or settlement of a claim shall have been made, as in paragraph (b) of this article, and the claim becomes the subject of legal proceedings in the United States Court of Claims, or other appropriate United States court, the Government of the United Kingdom will (if it shall so request) be permitted to assist the Government of the United States of America in defending any such proceedings.

ARTICLE VIII

The Government of the United Kingdom shall not be liable in respect of claims asserted by nationals of the United States of America in the United States as a result of the use and practice of any patent rights, information, inventions, designs, or processes, or as a result of production, use, or disposition of articles embodying the subject-matter of any of the aforesaid.

ARTICLE IX

In order to avoid conflict with the understanding contained in this agreement, departments or agencies of the Government of the United States of

America which negotiate contracts for production in the United States pursuant to specifications furnished by or on behalf of the Government of the United Kingdom, will not require contractors in the United States to give indemnities to the Government of the United States of America which would be likely to result in efforts by the contractors to obtain an offsetting indemnity from the Government of the United Kingdom; the Government of the United Kingdom assumes a reciprocal obligation toward the Government of the United States of America.

ARTICLE X

Anything contained in this agreement to the contrary notwithstanding, any obligations heretofore or hereafter undertaken by the Government of the United Kingdom pursuant to the provisions of Section 7 of the Act of the Congress of the United States approved March 11, 1941 (Public 11, 77th Congress), as such obligations may be interpreted by the President of the United States of America or by a United States court of competent jurisdiction, shall be performed by the Government of the United Kingdom.

ARTICLE XI

All payments made by the Government of the United States of America and the Government of the United Kingdom, respectively, in carrying out the terms of this agreement shall be accounted for by the appropriate agencies of the two governments as aid extended and benefits received by the Government of the United States of America in accordance with the Act of the Congress of the United States approved March 11, 1941 (Public 11, 77th Congress) and the agreement between the two governments entered into at Washington on February 23, 1942.

ARTICLE XII

Each government will give to the other government all possible information and other assistance required in connection with computing any payments to be made to nationals of the other government with respect to the use of their patent rights, information, inventions, designs or processes.

ARTICLE XIII

A joint committee of representatives of the Government of the United States of America and of the Government of the United Kingdom shall be established for the purpose of dealing with problems arising in connection with operations under this agreement and of making appropriate recommendations to proper authorities with respect thereto.

ARTICLE XIV

License agreements, or other contractual obligations between nationals of the United States of America on the one hand and nationals of the United

Kingdom on the other hand, existing on January 1, 1942, and continuing in effect, or any claim for royalty arising thereunder, shall not be deemed to be within the scope of this agreement.

ARTICLE XV

This agreement shall be deemed to have been in effect and operation as from January 1, 1942. Each government shall have the option to terminate this agreement as from any date specified in a notice given by the government exercising such option to the other government, which date shall be not less than six months from the giving of such notice, and the provisions of this agreement shall cease to be effective from the date so specified, but without prejudice to any liability which may then already have been incurred, or which may thereafter arise, pursuant to any obligations undertaken by either government by virtue of this agreement.

Signed and sealed in duplicate at Washington this twenty-fourth day of August, 1942.

For the Government of the United States of America

CORDELL HULL [SEAL]
*Secretary of State of the
 United States of America*

For the Government of the United Kingdom of Great Britain and Northern Ireland

HALIFAX [SEAL]
*His Majesty's Ambassador
 Extraordinary and Plenipotentiary at Washington*

INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL

Washington, June 30–July 10, 1942

FINAL ACT ¹

The Inter-American Conference on Systems of Economic and Financial Control met at the Pan American Union in Washington from June 30 to July 10, 1942, pursuant to invitations extended by the Inter-American Financial and Economic Advisory Committee to the Governments of the American Republics, with the following representatives in attendance:

ARGENTINA

Delegate: Edmundo Gagneux, Assistant General Manager, Central Bank of the Argentine Republic.

Adviser: Edgardo Grumbach, Chief, Foreign Exchange Department, Central Bank of the Argentine Republic.

¹ Pan American Union, Congress and Conference Series, No. 39.

Adviser: José Julio Brignoli, Central Bank of the Argentine Republic.

BOLIVIA

Delegate: Humberto Cuenca, General Manager, Central Bank of Bolivia.

BRAZIL

Delegate: Francisco Alves dos Santos, Jr., Director of Exchange, Bank of Brazil.

Adviser: Achilles Moreaux, Official, Bank of Brazil.

CHILE

Delegate: Pedro Enrique Alfonso, Counselor of the Central Bank of Chile.

Adviser: Ramón Rojas Castro, Official of the Central Bank of Chile.

COLOMBIA

Delegate: Alberto Bayón, Chief, Office of Exchange and Export Control, Bank of the Republic.

Delegate: Antonio Puerto, Member of the Governing Board of the Bank of the Republic.

COSTA RICA

Delegate: Julio Peña, General Manager, National Bank of Costa Rica.

Delegate: Raúl Gurdíán.

Delegate: J. Rafael Oreamuno, Representative of Costa Rica on the Inter-American Financial and Economic Advisory Committee; Member and Vice Chairman of the Inter-American Development Commission.

CUBA

Delegate: Ramiro Guerra y Sánchez, Representative of Cuba on the Inter-American Financial and Economic Advisory Committee.

Adviser: Raoul Herrera-Arango, Second Secretary, Cuban Embassy, Washington.

Adviser: Felipe Pazos y Roque, Commercial Attaché, Cuban Embassy, Washington.

DOMINICAN REPUBLIC

Delegate: Harry E. Henneman, Special Representative of the Ministry of Finance and Commerce and of the Reserve Bank of the Dominican Republic.

Delegate: H. Murray-Jacoby, Commercial Adviser, Consulate General of the Dominican Republic, New York.

Delegate: Rafael A. Espaillet, Commercial Attaché, Legation of the Dominican Republic, Washington.

ECUADOR

- Delegate:* Eduardo Icaza, President, Central Bank of Ecuador.
Delegate: Alberto Alcívar, General Manager, Central Bank of Ecuador.
Delegate: Luis Eduardo Lazo, Chief Statistician, Central Bank of Ecuador.

EL SALVADOR

- Delegate:* Carlos Adalberto Alfaro, Chargé d'Affaires, a.i., of El Salvador, Washington.

GUATEMALA

- Delegate:* Luis Beltranena, Dean, School of Economic Sciences, University of Guatemala.

HAITI

- Delegate:* Abel LaCroix, Minister of Finance.

HONDURAS

- Delegate:* Julián R. Cáceres, Minister of Honduras in Washington.

MEXICO

- Delegate:* Eduardo Villaseñor, Director General, Bank of Mexico.
Delegate: Antonio Carrillo, Director General of Credit, Ministry of Finance and Public Credit.
Adviser: Raul Martínez Ostos, Legal Adviser, Bank of Mexico.
Adviser: Victor L. Urquidi, Economist, Bank of Mexico.

NICARAGUA

- Delegate:* Leon DeBayle, Minister of Nicaragua in Washington.
Delegate: Rafael A. Huezó, General Manager, National Bank of Nicaragua.

PANAMA

- Delegate:* Ricardo Marciacq, Comptroller General of the Republic.
Adviser and Alternate: Bey M. Arosemena, Commercial Counselor, Embassy of Panama, Washington.
Delegate:

PARAGUAY

- Delegate:* Harmodio González, Manager, Bank of the Republic.

PERU

- Delegate:* Manuel C. Gallagher.
Delegate: Alfredo Alvarez Calderon.

UNITED STATES OF AMERICA

- Delegate:* Edward H. Foley, Jr., General Counsel, Department of the Treasury.
- Adviser:* Emilio G. Collado, Special Assistant to the Under Secretary of State.
- Adviser:* Donald Hiss, Chief, Foreign Funds Control Division, Department of State.
- Adviser:* Edward G. Miller, Jr., Foreign Funds Control Division, Department of State.
- Adviser:* Harry D. White, Assistant to the Secretary of the Treasury.
- Adviser:* Bernard Bernstein, Assistant General Counsel, Department of the Treasury.
- Adviser:* John W. Pehle, Assistant to the Secretary of the Treasury.
- Adviser:* L. Werner Knoké, Vice President, Federal Reserve Bank of New York.
- Secretary:* Guillermo Suro, Chief, Central Translating Office, Department of State.
- Secretary:* Josiah E. DuBois, Office of General Counsel, Department of the Treasury.

URUGUAY

- Delegate:* Roberto MacEachen, Minister of Uruguay to Cuba.
- Secretary:* Carlos M. Fernández Goyechea, Financial Attaché, Embassy of Uruguay in Washington.

VENEZUELA

- Delegate:* Diógenes Escalante, Ambassador of Venezuela in Washington.
- Delegate:* José J. González Gorrondona, Director of the Central Bank; President of the Import Control Board of Venezuela.
- Adviser:* Manuel Pérez Guerrero, Secretary, Import Control Board of Venezuela.
- Secretary:* Luis E. Gómez Ruiz, First Secretary, Embassy of Venezuela, Washington.

The opening session of the Conference was held in the Hall of the Americas of the Pan American Union on June 30, under the provisional presidency of the Honorable Sumner Welles, Chairman of the Inter-American Financial and Economic Advisory Committee, who delivered an address of welcome. A welcome on behalf of the Pan American Union was also extended to the delegates by the Director General, Dr. L. S. Rowe, and the response on behalf of the delegates was made by the representative of Peru, Dr. Manuel C. Gallagher. At this session the delegate of the United States of America, Mr. Edward H. Foley, Jr., was elected Chairman, and the representative of Brazil, Dr. Francisco Alves dos Santos, Jr., Vice Chairman of the Conference.

The program and regulations had been formulated by the Inter-American Financial and Economic Advisory Committee to give effect to the purposes of the Conference as set forth in Resolutions V and VI of the Third Meeting of the Ministers of Foreign Affairs of the American Republics, and were approved at the inaugural session of June 30. To facilitate the work of the Conference two committees were appointed to consider, respectively, the topics in the agenda relating to international transactions and those pertaining to domestic transactions. All countries were represented on each of the two committees which, at their first sessions held on July 1, elected the following officers:

COMMITTEE I—INTERNATIONAL TRANSACTIONS

<i>Chairman:</i>	Raúl Gurdíán (Costa Rica)
<i>Vice Chairman:</i>	Pedro Enrique Alfonso (Chile)
<i>Reporting Delegate:</i>	Ramiro Guerra y Sánchez (Cuba)

COMMITTEE II—DOMESTIC TRANSACTIONS

<i>Chairman:</i>	Alberto Bayón (Colombia)
<i>Vice Chairman:</i>	Edmundo Gagneux (Argentina)
<i>Reporting Delegate:</i>	Eduardo Villaseñor (Mexico)

A Coördination Committee was also appointed in accordance with the regulations, consisting of one representative for each of the official languages of the Conference, as follows:

Achilles Moreaux (Brazil)
Ramiro Guerra y Sánchez (Cuba)
Abel LaCroix (Haiti)
Emilio G. Collado (United States of America)

In accordance with the regulations and on the basis of a proposal of the Director General of the Pan American Union, the following were named to constitute the Secretariat of the Conference:

<i>Secretary General:</i>	William Manger
<i>Secretary of Committee I:</i>	Francisco J. Hernandez
<i>Secretary of Committee II:</i>	Luis Delgado Gardel

The Inter-American Conference on Systems of Economic and Financial Control, considering that the American Republics, in accordance with Recommendations V and VI of the Third Meeting of the Ministers of Foreign Affairs of the American Republics held at Rio de Janeiro in January, 1942, have the most firm intention to adopt the measures that may be necessary to impede all operations of a commercial and financial character contrary to the security of the Western Hemisphere, adopts the following recommendations:

I. FINANCIAL AND COMMERCIAL TRANSACTIONS WITH AGGRESSOR
NATIONS AND NATIONS DOMINATED BY THEM

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

That the Governments of the American Republics, pursuant to Resolution V of the Third Meeting of the Ministers of Foreign Affairs of the American Republics, held at Rio de Janeiro, adopt and put into effect as soon as possible, effective measures to achieve the following purposes:

(a) To block effectively the use, transmission or transfer of funds, securities and property within the American Republics now held by nations which have committed acts of aggression against the American Continent, or subsequently acquired for their account, as well as the funds, securities and property now held by a real or juridical person within such aggressor nations or in the territories dominated by them, or subsequently acquired for the account of such persons.

(b) To prevent any real or juridical person within the jurisdiction of an American Republic from engaging in any financial or commercial transaction which involves the exportation of any property of any nature whatsoever, the remittance of any funds, or orders or instructions to persons under the jurisdiction of aggressor nations or those dominated by them, whether such exportation or remittance be made, or such orders or instructions be given, directly or indirectly.

There shall be excepted remittances (i) for living expenses of citizens of such American Republics residing within the aggressor nations or in the territories dominated by them, and (ii) for the expenses of representing the governmental interests of such American Republics in the aggressor nations or in the territories dominated by them, including the care and safeguarding of the property of the Governments of such American Republics. The said payments can only be made directly by the Government of the respective American Republic, or through the government representing its interests in such aggressor nations, or in the territories dominated by them.

(c) To prevent any real or juridical person within the jurisdiction of an American Republic from engaging in any financial or commercial transaction which involves the importation of any property of any nature whatsoever or the receipt of any funds, or the acting upon any order or instruction from any person within the jurisdiction of the aggressor nations or nations dominated by them, whether such importation, receipt of funds, or compliance with such order or instruction be made directly or indirectly.

There shall be excepted the remittances which each government in its discretion may authorize (i) for living expenses of citizens of such aggressor nations or nations dominated by them, residing within the American Re-

publics, and (ii) for expenses of representing the governmental interests of the aggressor nations or nations dominated by them, in the American Republics, including the care and safeguarding of the property of the governments of said aggressor nations or the nations dominated by them.

Except in cases of effective reciprocity, the exceptional payments referred to in the preceding paragraph shall in no case be made out of blocked funds or other assets which the aggressor nations or the nations dominated by them may have in the American Republics, but shall only be made out of unblocked funds of foreign ownership originating in territory outside the American Republics. Remittances for said payments shall be received only directly by the Government of the respective American Republic, or through the intermediary of the government which represents in such American Republic the interests of said aggressor nations or of nations dominated by them.

II. FINANCIAL AND COMMERCIAL TRANSACTIONS WITH COUNTRIES OUTSIDE THE WESTERN HEMISPHERE

The Inter-American Conference on Systems of Financial and Economic Control

Recommends:

That the Governments of the American Republics, in addition to cutting off all financial and commercial transactions with the aggressor nations and the nations dominated by them, adopt as soon as possible, endeavoring not to cause unnecessary damage to neutral nations, appropriate measures with respect to their financial and commercial relationships with all of the other nations outside the Western Hemisphere, in order to:

(a) Supervise adequately the funds and property within their respective jurisdictions now held or hereafter acquired by or for such other nations outside the Western Hemisphere or real or juridical persons within such nations, except those nations which have cut off commercial and financial transactions with the aggressor nations.

(b) Prevent any real or juridical person within the jurisdiction of such American Republic from engaging in any commercial or financial transaction which involves the exportation or importation of any property of any nature whatsoever to or from nations outside the Western Hemisphere, or the remittance of funds to or from any person in such other nations outside the Western Hemisphere, when such exportation, importation or remittance is of benefit to the aggressor nations or to nations dominated by them.

(c) Prevent all transactions between the American Republics and nations outside the Western Hemisphere involving any real or juridical person within any nation outside the Western Hemisphere whose activities are deemed by the respective American Republic concerned to be inimical to the security of the Western Hemisphere.

III. TRANSACTIONS AMONG THE AMERICAN REPUBLICS

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

That, to prevent financial and commercial transactions which are of benefit to any of the nations which have committed acts of aggression against the American Continent, and transactions undertaken by any real or juridical person within the American Republics whose activities are inimical to the security of the Western Hemisphere, the Governments of the American Republics adopt, as soon as possible, measures to:

(a) Establish between the American Republics an interchange of information with respect to commercial and financial transactions undertaken with real or juridical persons within other American Republics so that each nation, within its jurisdiction and in the exercise of its own authority, may prevent any transaction which would benefit the aggressor nations, the nations dominated by them, or persons whose activities are inimical to the security of the American Continent.

(b) Prevent any transaction, subject to the jurisdiction of an American Republic, undertaken by real or juridical persons within nations outside the Western Hemisphere which have not cut off commercial and financial transactions with the aggressor nations, involving the monetary unit of another American Republic; except a transaction which, together with the report necessary to establish its nature, is undertaken through a bank of the American Republic whose monetary unit is involved in the transaction.

(c) Prevent any transaction, subject to the jurisdiction of an American Republic, involving real or juridical persons within nations outside the Western Hemisphere which have not cut off commercial and financial relations with the aggressor nations, and real or juridical persons within another American Republic, unless such transactions are performed with the approval of the latter Republic.

IV. CONTROL OF MOVEMENT AND TRANSFER OF SECURITIES

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

That the Governments of the American Republics, in order to prevent transactions in securities for the benefit of the aggressor nations, adopt appropriate measures to:

(a) Establish a precautionary blocking of securities which directly or indirectly are imported into the American Republics from countries outside the Western Hemisphere, as well as their coupons, interest, and dividends, until it is determined that the aggressor nations, or the nations dominated by them, or persons within such nations, have not or have not had any interest in them since the beginning of the present emergency.

Non-bearer securities imported into American nations from countries outside the Western Hemisphere after the beginning of the present emergency, likewise may be subjected to precautionary blocking.

(b) To supervise transactions of any nature whatsoever by persons within an American Republic in securities, or interests therein, which are located outside the Western Hemisphere, so as to prevent transactions in which persons in aggressor nations or nations dominated by them have an interest or have had an interest since the beginning of the present emergency; or those from which they may derive some benefit direct or indirect.

(c) Require registration, or adopt any other appropriate measures, in order to determine if any person within the aggressor nations or the nations dominated by them, has any interest in securities issued or payable in any of the American Republics.

V. STANDARDS FOR THE APPLICATION OF FINANCIAL AND ECONOMIC CONTROLS WITHIN THE AMERICAN REPUBLICS

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

1. That the application of the economic and financial controls of the Governments of the American Republics, during the present emergency, should have as one of its objectives the control of the property and transactions of all persons, real or juridical, residing or situated within their respective jurisdictions, regardless of nationality, who by their conduct are known to be, or to have been, engaging in activities inimical to the security of the Western Hemisphere.

2. That each of the Governments of the American Republics, through the application of its economic and financial controls, eliminate from the economic life of the respective country all undesirable influence and activity of those persons, real or juridical, residing or situated within the American Republics, who are known to be, or to have been, engaging in activities inimical to the security of the Western Hemisphere.

VI. STANDARDS OF EFFECTIVE BLOCKING

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

1. That the Governments of the American Republics that have not already done so adopt, in accordance with their constitutional principles, measures to carry out the effective blocking of assets belonging to real or juridical persons, whatever may be their nationality, when these persons are deemed by the respective government to act in a manner contrary to the security or the national economies of the American Republics; these measures shall not exclude other measures which may be taken by the govern-

ments with regard to commercial, industrial, agricultural, financial or other enterprises, which measures are recommended elsewhere.

2. That blocking shall include all cash, securities, income or other assets of any other kind, including the proceeds of the sale or liquidation of assets or firms.

3. That blocked assets may not be disposed of without the authorization of the respective government or agencies. Any transaction contrary to these provisions shall be null and void.

4. That all blocked cash or securities shall be deposited in the central bank or in approved banks, or in appropriate organizations, subject to provisions adopted by the respective government.

5. That the governments shall not permit disposal of blocked assets if such action benefits, directly or indirectly, the interests of the aggressor nations or the nations dominated by them, whether such disposal takes place in the country in which the transaction originates or in any other country affected by the operation; or if such action is contrary to the fundamental purpose expressed in the first paragraph of this recommendation.

6. That the governments may authorize the disposal of blocked funds when the applicant proves that such funds are essential to his subsistence and that of his family; but such authorization shall not exceed the maximum periodical amount fixed by the respective government.

VII. CONTROL OF BUSINESS ENTERPRISES

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

1. That, in accordance with the constitutional procedure of each country, all necessary measures be adopted as soon as possible, in order to eliminate from the commercial, agricultural, industrial and financial life of the American Republics, all influence of governments, nations, and persons within such nations who, through natural or juridical persons or by any other means are, in the opinion of the respective government, acting against the political and economic independence or security of such Republics, and that to this end the following measures be adopted:

(a) The business, properties and rights of any real or juridical person included within the terms of the foregoing paragraph, whatever their nationality, shall be the object of forced transfer or total liquidation; and, if this should not be desirable in the opinion of the government of each country, they shall be the object of blocking, occupation or intervention in order to give effect to the purposes of this recommendation.

(b) The officers and employees of any real or juridical persons, whose actions may be contrary to the purposes set forth in paragraph 1 of this recommendation, shall be removed from their positions and the severance

payments to which they may be entitled shall be blocked; and the salaries and other remuneration of those who temporarily continue in service shall be limited and supervised, in order to comply with the aforementioned purposes.

(c) The contracts of such real or juridical persons which may be directly or indirectly contrary to the purposes set forth in the first paragraph of this recommendation, shall be rescinded; and in applying the measures set forth in paragraph (a), the contracts entered into by them and the concessions granted to them for the exploitation of natural resources and public services, such as land, mines, water rights, transportation and other similar activities, may also be considered rescinded and without effect.

(d) The following shall be effectively blocked in accordance with the regulations pertaining to blocking: the proceeds of the sale of transferred properties and rights; the profits accruing from intervened or supervised businesses; and the funds derived from total liquidations.

(e) The alienation, in any form, of the said properties and rights in accordance with paragraph (a), can only be made to nationals of the respective country or to juridical persons formed by them. In the establishment of the conditions of these acquisitions or in the selection of the buyers, the government of the country in which the transaction takes place shall not permit any direct or indirect participation by any real or juridical person whose activities are deemed contrary to the principles set forth in the first paragraph of this recommendation.

2. Each country shall designate one or more organizations to be in charge of the administration of the aforementioned measures.

3. The American Republics shall maintain an exchange of information on the measures adopted pursuant to this recommendation.

VIII. RECIPROCAL COÖPERATION AMONG THE AMERICAN REPUBLICS

The Inter-American Conference on Systems of Economic and Financial Control

Recommends:

That the Governments of the American Republics lend each other the greatest measure of coöperation in the formulation and application of systems and procedures which will facilitate placing in effect, within their jurisdictions and in the exercise of their authority, Recommendations V and VI adopted by the Third Meeting of the Ministers of Foreign Affairs of the American Republics, the consequent recommendations adopted by this Conference, and measures which have been or may be taken by the Governments of the American Republics.

That in consequence the aforesaid governments endeavor to establish an interchange of information and consultation which will afford knowledge of the experience acquired by each one of them.

IX. VOTE OF THANKS

The Inter-American Conference on Systems of Economic and Financial Control

Resolves:

To extend a vote of thanks to the personnel of the Pan American Union for the efficient manner in which they have collaborated, and the facilities that have been made available which to such a great degree have contributed to the success of the Conference.

The Conference wishes especially to record its appreciation to Dr. L. S. Rowe, Director General of the Pan American Union, who for so many years has contributed to the cause of inter-American understanding; to Dr. William Manger, Secretary General of the Conference, and to Mr. Francisco J. Hernández and Mr. Luis Delgado Gardel, Secretaries of Committees I and II, respectively, as well as to the personnel of the secretariat, for their whole-hearted coöperation in the work of the Conference.

IN WITNESS WHEREOF, the undersigned representatives sign the present Final Act.

Done in the city of Washington, this 10th day of July, 1942, in the English, French, Portuguese and Spanish languages.

ARGENTINA:

The approval of these recommendations by the Delegation of the Central Bank of the Argentine Republic must be considered subject to the terms of Recommendation V of the Meeting of Ministers of Foreign Affairs of the American Republics, held at Rio de Janeiro, as that Recommendation was accepted by the Argentine Delegation.

E. GAGNEUX

BOLIVIA:

H. CUENCA

BRAZIL:

F. ALVES FILHO

CHILE:

I sign as the Delegate of the Central Bank of Chile, with the understanding that these recommendations do not alter the obligations devolving upon my country as a result of Recommendation V of the Third Meeting of the Ministers of Foreign Affairs of the American Republics, held at Rio de Janeiro.

COLOMBIA:

PEDRO ENRIQUE ALFONSO

ALBERTO BAYÓN

ANTONIO PUERTO

COSTA RICA:

JULIO PEÑA

RAÚL GURDIÁN

J. RAFAEL OREAMUNO

CUBA:

RAMIRO GUERRA

DOMINICAN REPUBLIC:

H. E. HENNEMAN

H. MURRAY-JACOBY

RAFAEL A. ESPAILLAT

E. ICAZA	ECUADOR:
A. ALTIVAR	
LUIS EDUARDO LAZO	
C. A. ALFARO	EL SALVADOR:
LUIS BELTRANENA	
ABEL LACROIX	HAITI:
JULIAN R. CACERES	HONDURAS:
E. VILLASENOR	MEXICO:
A. CARRILLO	
LEON DEBAYLE	NICARAGUA:
R. A. HUEZO	
RICARDO MARCIACQ	PANAMA:
BEY M. AROSEMENA	
H. GONZALEZ	PARAGUAY:
MANUEL C. GALLAGHER	
A. ALVAREZ CALDERON	PERU:
E. H. FOLEY, JR.	UNITED STATES OF AMERICA:
R. C. MACFACHEN	URUGUAY:
DIOGENES ESCALANTE	VENEZUELA:
J. J. GONZALEZ	

INTER-AMERICAN JURIDICAL COMMITTEE

REAFFIRMATION OF FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW
PROJECT OF RESOLUTION SUBMITTED TO THE GOVERNMENTS, MEMBERS OF THE
PAN AMERICAN UNION¹

Rio de Janeiro, June 2, 1942

WHEREAS:

1. It has been the practice of the American Republics at their conferences, in their joint or individual declarations, and at the consultative meetings of their Foreign Ministers, to reaffirm fundamental principles of international law upon which their peace and continental solidarity are based;

¹ Text furnished by the Pan American Union. The project was accompanied by the following note, dated June 2, 1942, from the President of the Inter-American Juridical Committee to the Director General of the Pan American Union:

"I have the honor to send to you herewith for appropriate action the text of the Project of Resolution approved by this Committee, relative to the "Reaffirmation of Fundamental Principles of International Law," which is based on the project submitted by the Delegation of Bolivia to the Third Meeting of the Ministers of Foreign Affairs of the American Republics, and referred by the latter to the study of the Inter-American Juridical Committee.

"2. The members of the Committee unanimously resolved to suggest to you the desirability of opening the aforesaid Resolution for signature by the American Governments and that for this purpose full powers be granted to their representatives in Washington."

2. This reaffirmation of fundamental principles has always been useful and expedient because of the moral force which derives from it and because it tends to strengthen the position of the American States when confronted with new situations which challenge those principles;

3. In the presence of the grave violations of international law on the part of non-American aggressor States, this reaffirmation of principles becomes now all the more necessary in order to emphasize those principles and to clarify them in the light of the new conditions with which the American community is confronted;

4. The American continent has developed, and desires to develop in the future, its international life on the basis of respect for morality, traditional principles, the observance of treaties, good faith, and the rules of humanity, repudiating every act contrary to these essential standards of civilization.

THE AMERICAN REPUBLICS resolve to reaffirm in the most solemn manner the following principles which they believe to be fundamental in the relations of States and essential to the maintenance of peace and justice in international relations, and declare:

I. It is a basic principle of international law that there are certain general standards of conduct which take priority over the will of the individual State.

[Lima, 1938, Declaration of American Principles—Preamble.]

These standards are derived from the moral law which is the inheritance of Christian States and which came during the nineteenth century to be accepted also by non-Christian States as the rule of international conduct.

[Panama, 1939, Maintenance of international activities in accordance with Christian morality.]

No distinction is recognized between the moral law as applied to individual citizens and to nations. There is but one single standard of conduct between nation and nation and between man and man. The development of international law should be marked by the gradual extension to nations of the obligations recognized as binding between individual citizens.

Hence no nation may claim to be exempt from the observance of the moral law on the ground of political, economic or racial supremacy or of a particular national culture which it believes to be inherently superior to that of other States.

[Havana, 1940, Maintenance of peace and union among the American Republics, Sub-head 9.]

II. Respect by each State for the personality, sovereignty and independence of every other State constitutes the basis of international order, just as in the relations of individuals mutual respect constitutes the essence of democracy.

[Buenos Aires, 1936, Declaration of principles of Inter-American solidarity and coöperation, 1.]

[Lima, 1938, Declaration of the principles of the solidarity of America (Declaration of Lima), Preamble.]

Hence no State may intervene in the internal or external affairs of another.

[Montevideo, 1933, Convention on Rights and Duties of States, Art. 8.]

[Buenos Aires, 1936, Additional Protocol relative to Non-Intervention.]

[Lima, 1938, Declaration of American Principles.]

The policy of the "Good Neighbor" is an expression of this respect for the fundamental rights of States.

[Rio de Janeiro, 1942, The Good Neighbor Policy.]

III. States are juridically equal, in the sense that they have the same fundamental rights.

This equality derives from the existence of the State as a person of international law and not from the power which the individual State may possess to defend or maintain it.

In like manner this juridical equality is independent of the territorial size of the particular State or of the degree of its material progress.

In consequence, no State may be held bound by changes in the rules of law, whether in political or in economic matters, to which it has not freely consented.

[Montevideo, 1933, Convention on Rights and Duties of States, Art. 4.]

IV. Good faith, which is a sacred principle of international law, should govern the relations of States. Mutual trust in the pledged word is an essential condition of the peaceful coöperation of States. Treaty obligations, freely and voluntarily entered into, must be faithfully observed.

[Lima, 1938, Declaration of American Principles.]

[Rio de Janeiro, 1942, Continental solidarity in the observance of treaties.]

It is proper to examine treaties which, by reason of new circumstances, may admit revision with the object of improving or of bringing into complete accord the relations between the contracting parties.

[Washington, July 16, 1937. Statement of Secretary Hull.]

Treaties must be in the nature of open covenants openly arrived at; and there must be no secret agreements or understandings between States.

[Covenant of the League of Nations, Art. 19.]

V. The use of force between States is repudiated and outlawed; and no State may take the law into its own hands or seek to enforce its claims by violence.

[Washington, 1932, Declaration of August 3.]

[Rio de Janeiro, 1933, Argentine Anti-War Treaty.]

War as an instrument of national policy is condemned.

[Pact of Paris, 1928 (Kellogg-Briand Pact).]

[Montevideo, 1933, Convention on Rights and Duties of States, Art. 11.]

Hence no territorial conquest, occupation or transfer of territory brought about by force or by other methods of effective coercion, shall be valid or be recognized as having any degree of legality whatever.

[Buenos Aires, 1936, Declaration of principles of Inter-American solidarity and coöperation, 3 (a).]

[Lima, 1938, Non-recognition of the acquisition of territory by force.]

In like manner no treaties or other agreements entered into under violence or other form of compulsion shall be recognized as binding contracts, whether as between the parties themselves or in relation to third States.

VI. All differences or disputes between States, whatever their nature or origin, must be settled by peaceful procedures, in accordance with the provisions of international conventions, treaties and agreements, and on the basis of established principles of international law.

[Montevideo, 1933, Convention on Rights and Duties of States, Art. 10.]

[Buenos Aires, 1936, Declaration of principles of inter-American solidarity and coöperation, 2, 3 (d).]

When two or more States in controversy are unable to reach a peaceful agreement, the good offices or the mediation of other States between the parties are in order. These good offices or mediation are a friendly act in the interest of law and justice.

When these or other measures fail, consultation should take place among the States, with the object of formulating a collective recommendation or of seeking to renew friendly intervention.

[Lima, 1938, Declaration of American Principles.]

[Pact of Paris, 1928 (Kellogg-Briand Pact).]

[Argentine Anti-War Treaty, 1933.]

(S) AFRANIO DE MELLO FRANCO, *President*

(S) F. NIETO DEL RÍO

(S) P. CAMPOS ORTIZ

(S) CHARLES G. FENWICK

(S) C. E. STOLK

INTERNATIONAL TRADE IN WHEAT¹

MEMORANDUM OF AGREEMENT

Initialled at Washington, April 22, 1942; in force June 27, 1942, in accordance with the Minutes of the final session of the Washington Wheat Meeting, last paragraph, infra, p. 41.

1. Officials of Argentina, Australia, Canada and the United States, wheat exporting countries, and of the United Kingdom, a wheat importing country, met in Washington on July 10, 1941, to resume the wheat discussions which

¹ Department of State Press Release No. 325, July 1, 1942; Cmd. 6371, United States No. 2 (1942).

were interrupted in London by the outbreak of war in September 1939 and to consider what steps might be taken toward a solution of the international wheat problem.

2. The discussions at Washington, which extended over a period of many months, have made it clear that a satisfactory solution of the problem requires an international wheat agreement and that such an agreement requires a conference of the nations willing to participate which have a substantial interest in international trade in wheat. It was also recognized that pending the holding of such a conference the situation should not be allowed to deteriorate. The Washington Wheat Meeting has recorded the results of its deliberations in the attached Draft Convention in order to facilitate further international consideration of the subject at such time as may be possible and to provide a basis for such interim measures as may be found necessary.

3. The Washington Wheat Meeting has recognized that it is impracticable to convene at the present time the international wheat conference referred to above. Accordingly, the five countries present at that meeting have agreed that the United States, so soon as after consultation with other countries it deems the time propitious, should convene a wheat conference of the nations having a substantial interest in international trade in wheat which are willing to participate, and that the Draft Convention above mentioned should be submitted to that conference for consideration.

4. In the meantime there should be no delay in the provision of wheat for relief in war-stricken and other necessitous areas so soon as in the view of the five countries circumstances permit. Likewise it is imperative that the absence of control measures over the accumulation of stocks in the four countries now producing large quantities of wheat for markets no longer available should not create insoluble problems for a future conference. Accordingly, the five countries have agreed to regard as in effect among themselves, pending the conclusions of the conference referred to above, those arrangements described in the attached Draft Convention which are necessary to the administration and distribution of the relief pool of wheat and to the control of production of wheat other than those involving the control of exports.

5. If the conference contemplated above shall have met and concluded an agreement prior to the cessation of hostilities, no further action will be needed by the countries represented at the Washington meeting. However, if this is not the case, it will be necessary, in order to prevent disorganization and confusion in international trade in wheat, to institute temporary controls pending the conclusions of the conference. Accordingly the five countries agree that in the period following the cessation of hostilities and pending the conclusion of a wheat agreement at the conference referred to the arrangements described in the attached Draft Convention which relate to the control of production, stocks and exports of wheat and to the administra-

tion thereof will be brought into effect among themselves. Those arrangements will come into effect on such date as may be unanimously agreed. Announcement of that date will be made within six months after the cessation of hostilities.

6. Pending the conclusions of the conference contemplated above, the five countries, on the cessation of hostilities or such earlier date as they may agree, will regard as in effect among themselves the arrangements described in the attached Draft Convention for the control of the prices of wheat. The determination of prices required to be made in accordance with those arrangements will be made by unanimous consent. If no determination of prices has been made on the cessation of hostilities, the five countries will, pending such determination but for a period not exceeding six months, maintain as the export price of wheat the last price negotiated by the United Kingdom for a bulk purchase of wheat from the principal country of supply; equivalent f.o.b. prices will be calculated for wheats of the other exporting countries and will be adjusted from time to time to meet substantial changes in freight and exchange rates.

7. In taking any decisions under this Memorandum and the arrangements of the Draft Convention which it brings into operation each of the five countries will have one vote and a two-thirds majority will be required for decision except as otherwise provided herein.

8. The provisions of this Memorandum will be superseded by any agreement reached at the proposed wheat conference or by any arrangements which the five countries and other interested countries may make to deal with the period pending such a conference. In any event they are to terminate two years from the cessation of hostilities.

For Argentina:

A. M. V.

For Australia:

E. McC.

For Canada:

C. F. W.

For the United Kingdom:

H. F. C.

For the United States:

L. A. W.

DRAFT CONVENTION

PREAMBLE

1. The prospects with regard to the production and marketing of wheat are such that accumulation of wheat surpluses threatens to result in grave post-war difficulties for the economies of the producing countries and hence, because of the interdependence of nations, for the economies of all countries. It is also to be expected that, unless appropriate action is taken, such accumulation will recur.

2. A solution of the problem thus presented must be regarded as an essential part of any program of world economic reconstruction and will call

for coöperative action by all countries concerned in international trade in wheat. It will involve national and international measures for the regulation of wheat production in both exporting and importing countries, for the orderly distribution of wheat and flour in domestic and international trade at such prices as are fair to consumers and provide a reasonable remuneration to producers and for the maintenance of world supplies which shall be at all times ample for the needs of consumers without being so excessive as to create a world burden of unwanted surpluses.

3. Coöperative action is also necessary to meet the need for relief in the war-stricken areas of the world by the supply and distribution of gifts of wheat.

4. The benefits of abundant world supplies of wheat cannot be assured to consumers unless there is a substantial decrease in uneconomic incentives to high-cost production, a lowering of barriers to world trade and the charging of prices to consumers not substantially higher than the price of wheat in international trade.

5. In many countries the standard of living would be improved by increasing the consumption of wheat through a lowering of prices. In all countries the standard of living would be improved by stimulating the consumption of foods rich in vitamins, proteins and minerals. The increased production of such foods would offer a more valuable use for land which has at times been used uneconomically for high-cost production of wheat.

6. Producers of an international commodity such as wheat are directly affected by standards of living throughout the world, by international purchasing power and by prevailing policies and practices affecting international trade generally. There can be no basic solution of the problem of export surpluses without a general reduction of import barriers and no measure should be taken or maintained which has the effect of retarding such reduction or of preventing in any way the fullest possible development of international trade.

Accordingly the contracting governments have agreed as follows:

ARTICLE I (Expansion of Trade)

1. The contracting governments agree that an essential element of a solution of the world wheat problem is that consumers should have the opportunity and means of increasing their purchases of wheat from areas which are equipped to produce it economically. They agree that such opportunity and means depend not only on the lowering of barriers to the importation of wheat but also on making available to wheat importing countries increased outlets for the exportation of goods which they in turn are equipped to produce economically. They agree that this requires the adoption and pursuit of national and international policies aimed at a fuller and more efficient use among nations of human and natural resources and thereby a world-wide expansion of purchasing power.

2. Recognizing therefore that much that is called for transcends the scope of a wheat agreement and requires action on a broad international basis, but that much also can be accomplished by national measures and by agreements with each other and with other countries, the contracting governments undertake to further in every way possible the attainment of the foregoing objectives.

3. The Council shall from time to time submit to the contracting governments a review of international trade in wheat and invite them to consider, in the light of the foregoing, what measures may be adopted for the expansion of such trade.

ARTICLE II (Production Control) ²

1. The Governments of Argentina, Australia, Canada and the United States of America shall adopt suitable measures to ensure that the production of wheat in their territories does not exceed the quantity needed for domestic requirements and the basic export quotas and maximum reserve stocks for which provision is hereinafter made.

2. Should nevertheless production in any country be found to have exceeded in any crop-year the quantity above prescribed, the government of that country shall before the end of that crop-year take such action as will result in the disappearance of the excess production within its territories before the end of the following crop-year or shall otherwise deal with such excess production as the Council may direct, except that if any part of the excess production is shown to the satisfaction of the Council to be due to a yield above the average of the preceding 20 years the government of the country concerned may carry that part as provided in paragraph 3 (a) of Article III or deal with it in such other manner as may be agreed with the Council.

3. Pending the coming into force of paragraphs 1 and 2 of this article, the Governments of Argentina, Australia, Canada and the United States of America shall adopt or maintain positive measures to control production with the object of minimizing the accumulation of excessive stocks.

ARTICLE III (Stocks)

1. The Governments of Argentina, Australia, Canada and the United States of America shall, subject to the provisions of paragraphs 2, 3, 4 and 5 of this article, ensure that stocks of old wheat held at the end of their respective crop-years are not less than 35, 25, 80 and 150 million bushels respectively, and not more than 130, 80, 275 and 400 million bushels respectively. Any stocks not in excess of the specified maximum are hereinafter called "reserve stocks".

² This article to be expanded, when further international consideration of the subject is possible, to include provisions for production control in other exporting countries and in importing countries.

2. Stocks of old wheat in any country may be permitted to fall below the specified minimum (a) if the new crop together with the carry-over from the previous crop-year is insufficient to meet domestic requirements and leave at the end of that crop-year the minimum reserve stocks specified, in which case those stocks may be reduced by the amount necessary fully to meet domestic requirements, and (b) in so far as the Council decides that exports from the minimum reserve stocks of that country are required fully to meet the world demand for imported wheat.

3. Stocks of old wheat may exceed the maximum by (a) the quantity of permitted excess stocks ascertained under paragraph 4 of this article and (b) the quantity of permitted surplus stocks ascertained under paragraph 5 of this article.

4. Such part of excess production in the first crop-year in which it occurs following the crop-year in which Article IV comes into force as may be shown under paragraph 2 of Article II to be due to above average yields shall be permitted excess stocks at the end of that crop-year. The permitted excess stocks at the end of each succeeding crop-year shall be ascertained by the Council by deducting from the permitted excess stocks, if any, at the end of the preceding crop-year any quantity by which production in the crop-year then ending was less than the maximum prescribed in paragraph 1 of Article II or by adding thereto such part of any excess production in that crop-year as may be shown under paragraph 2 of Article II to be due to above average yields.

5. Stocks in excess of the maximum, as ascertained by the Council, at the end of the crop-year in which announcement is made of the date on which the provisions of Articles II, III and IV will come into effect shall be permitted surplus stocks, unless that announcement is made less than 45 days prior to the beginning of the seeding period for the next harvest in which case stocks in excess of the maximum at the end of the succeeding crop-year shall be permitted surplus stocks. Permitted surplus stocks at the end of each succeeding crop-year shall be ascertained by the Council by deducting from the permitted surplus stocks at the end of the preceding crop-year (a) any secondary or supplementary export quotas allocated in the crop-year then ending and (b) any quantity by which production in that crop-year plus the permitted excess stocks at the end of the preceding crop-year was less than the maximum production prescribed in paragraph 1 of Article II.

6. Should it be shown to the satisfaction of the Council that, owing to insufficient or defective storage facilities, any part of the permitted surplus stocks in any country has been destroyed or has been disposed of by governmental measures in a manner clearly constituting extraordinary use such part shall nevertheless be counted as permitted surplus stocks for the purposes of paragraphs 3 and 4 of Article IV so long as any other permitted surplus stocks remain in that country.

7. The Council shall

(a) at its regular August meeting ascertain the permitted surplus stocks in Canada and the United States of America at the end of their preceding crop-years and estimate such stocks in Argentina and Australia at the end of their current crop-years

and

at its regular January meeting ascertain the permitted surplus stocks in Argentina and Australia at the end of their preceding crop-years and estimate such stocks in Canada and the United States of America at the end of their current crop-years.

ARTICLE IV (Export Control)

1. The contracting government of each exporting country shall adopt the measures necessary to ensure that net exports of wheat, including flour expressed in terms of its wheat equivalent, from its territories in each quota-year shall not, subject to the provisions of paragraph 11 of this article, exceed the basic, secondary and supplementary export quotas for which provision is hereinafter made. It is recognized in principle that, within the framework of this agreement, wheat from each exporting country should continue to find its way into its normal markets.

2. The basic export quotas for Argentina, Australia, Canada and the United States of America shall, subject to the provisions of paragraph 3 of this article, be 25, 19, 40 and 16 percent respectively of the Council's latest published estimate of the total volume of international trade in wheat and flour in each quota-year less (a) such basic export quotas for other exporting countries as may be agreed under Article XIV and (b) reasonable allowances, having due regard to exports in past years, for net exports from the territories of governments not parties to the agreement.

3. Should the residual quantity ascertained under paragraph 2 of this article exceed 500 million bushels in any quota-year, the excess shall be allocated to Argentina, Australia, Canada and the United States of America as secondary export quotas. Allocations made in the first half of the quota-year shall be in proportion to permitted surplus stocks as determined under paragraph 7 (a) of Article III and allocations made in the second half of the quota-year shall be in proportion to permitted surplus stock as determined under paragraph 7 (b) of Article III. Should there be no permitted surplus stocks in any of those four countries the excess shall be allocated to those countries as secondary export quotas in proportion to their basic export quotas.

4. If the Council is satisfied that any part of any country's export quota or of the allowance made for its exports for any quota-year will not be exported by that country in that quota-year, it shall, subject to the provisions of paragraph 6 of this article, reallocate that part as supplementary export quotas to the other exporting countries in accordance with the procedure

prescribed in paragraph 3 of this article for the allocation of secondary export quotas. Should there be no permitted surplus stocks in any of those countries that part shall, unless the Council otherwise decides, be re-allocated as supplementary export quotas to those of the other exporting countries which have percentage export quotas in proportion to those quotas.

5. No decisions taken by the Council pursuant to paragraph 4 of this article shall prejudice the right of any country to export its full export quota within the quota-year to which it relates.

6. Should it be shown to the satisfaction of the Council that the failure of any country to ship any part of its export quota during the first quota-year is due to shortage of shipping, the amount of the supplementary export quotas allocated to other countries in respect of such part shall be deducted from the basic export quotas of those countries for the second quota-year and added to the aforementioned country's basic export quota for the second quota-year.

7. No export quota or part thereof shall be exported in any quota-year other than that to which it relates, except as otherwise provided in this article. Should it nevertheless be shown to the satisfaction of the Council that, owing to unavoidable delay in the arrival or departure of ships, part of an export quota had not been shipped at the end of the quota-year that part may be shipped in the following quota-year but shall be deemed to have been shipped in the quota-year to which it relates.

8. No export quota or part thereof shall be ceded, transferred or loaned by any country except as provided in this article or with the unanimous approval of the contracting governments of exporting countries.

9. When it appears that any country is approaching the limit of its export quota, the Chairman of the Council on the recommendation of the Executive Committee shall request the government of that country to control loadings for export during the remainder of the quota-year and to telegraph each week to the Council the gross exports and gross imports of wheat and of wheat flour from and into its territories during the preceding week.

10. When the Chairman of the Council after consultation with the Executive Committee finds that any country has exported its export quota for any quota-year he shall immediately make a declaration to that effect. The contracting government of the exporting country concerned shall thereupon announce that the exportation of wheat or flour from its territories will not be permitted after seven days from the date of the Chairman's declaration and the contracting government of each importing country shall not permit the importation into its territories of wheat or flour shipped from that exporting country during the current quota-year more than seven days after the date of the Chairman's declaration.

11. Should it be found that, owing to practical difficulties of closely controlling shipments, exports from any country have exceeded its export quota, that country shall not be deemed to have infringed the provisions of para-

graph 1 of this article so long as the excess is not more than 5 percent of the quota, but the amount of that excess up to 3 percent of the quota and three times the amount of that excess above 3 percent of the quota shall be deducted from that country's export quota for the following quota-year.

12. The contracting governments recognize that international trade in wheat should be distributed on a fair and equitable basis among all countries which export wheat and they agree that the effective operation of the agreement should not be impaired by abnormal exports from countries that have not acceded to it. Accordingly the contracting governments shall cooperate in taking, on the advice of the Council, such practicable measures as may be necessary to attain this end.

ARTICLE V (Price Control)

1. The Council shall fix and publish prior to the coming into force of Article IV and thereafter at each regular August meeting a basic minimum price and a basic maximum price of wheat, c.i.f. United Kingdom ports, and schedules of prices, c.i.f. and/or f.o.b., equivalent thereto for the various wheats sold in world markets. These prices shall take effect on such date as may be determined by the Council and shall remain in force until the effective date of the prices fixed by the Council at its next regular August meeting but shall be subject to such adjustments as the Council may find necessary to meet substantial changes in freight or exchange rates or as may be made in accordance with the provisions of paragraph 3 of this article.

2. The prices fixed under paragraph 1 of this article shall be such as will in the opinion of the Council (a) return reasonably remunerative prices to producers in exporting countries, (b) be fair to consumers in importing countries, (c) be in reasonable relationship to prices of other commodities and (d) make appropriate allowance for exchange rates and transportation costs.

3. Should the Council so decide the basic minimum and maximum prices of wheat and the schedules of prices equivalent thereto shall be adjusted at monthly or other intervals to allow for carrying charges.

4. The Governments of Argentina, Australia, Canada and the United States of America shall not, after the coming into force of paragraph 1 of this article, sell or permit the sale of wheat for export, or to millers for producing flour for export, at prices below the minimum equivalents fixed by the Council under paragraph 1 or 3 of this article.

5. The Governments of Argentina, Australia, Canada and the United States of America shall ensure that wheat for export is at all times on sale at f.o.b. prices not in excess of the maximum equivalents fixed by the Council under paragraph 1 or 3 of this article.

ARTICLE VI (Relief Pool)

1. The Governments of Argentina, Australia, Canada, the United King-

dom and the United States of America shall establish a pool of wheat which will be available for intergovernmental relief in war-stricken countries and other necessitous areas of the world, where circumstances in the view of those governments make such relief practicable.

2. The Governments of Canada, the United Kingdom and the United States of America shall give to the pool, as and when required by the Council, 25, 25 and 50 million bushels respectively of wheat, or its equivalent in whole or part in flour, f.o.b. seaboard port in the country of origin.

3. The Governments of Argentina, Australia, Canada and the United States of America shall, as and when required by the Council, give to the pool in addition to the contributions prescribed in paragraph 2 of this article a quantity of wheat or its equivalent in whole or part in flour, f.o.b. seaboard port, to be determined by them in consultation with the Council and on such basis as may be agreed among them.

4. The Council shall be responsible for the administration of the relief pool and shall, wherever possible, arrange for the distribution of relief wheat through such intergovernmental relief body as may be set up and given general responsibility for the distribution of relief. Should the Council decide to make relief wheat or flour available to any necessitous area in which the intergovernmental relief body has not the organization necessary for the distribution of such wheat or flour the Council shall arrange with the appropriate authorities to distribute such wheat or flour in that area. Any arrangements for the distribution of relief wheat shall be such as to minimize, so far as the provision of sufficient relief permits, the reduction of the effective demand for wheat on sale.

5. The United Kingdom Government may, if so agreed by the Council after consultation with the intergovernmental relief body, contribute transportation of relief wheat or flour in lieu of part or all of its contribution under paragraph 2 of this article.

6. Any contributing government shall, if the Council after consultation with the intergovernmental relief body so requests and upon such terms of replacement as may be agreed with the Council, make, pending the arrival of contributions by other governments, advances of such wheat or flour as that government may consider practicable to release for immediate relief.

7. Should the Council consider or be advised by the intergovernmental relief body that the quantity of relief wheat contributed under paragraphs 2, 3 and 5 of this article appears likely to prove insufficient, the Council shall make recommendations to the contracting governments regarding additional contributions.

8. The Council shall instruct the Executive Committee (a) to facilitate the transfer of relief wheat and flour from the national wheat-handling organizations of the contributing governments to the intergovernmental relief body, (b) to maintain effective liaison between the national wheat-handling and shipping organizations of the contributing governments and

international shipping and transport controls and (c) generally to consult with the intergovernmental relief body regarding all transactions relating to the relief pool.

9. Should the Council receive, at any time after the completion of the relief to which the provisions of paragraphs 1 to 8 of this article relate, an appeal for relief wheat or flour from any government to relieve famine in any area within the jurisdiction of that government, the Council shall investigate the possibilities of meeting such an appeal and report to the contracting governments its findings together with its recommendations.

ARTICLE VII (The Council) ³

1. This agreement shall be administered by an International Wheat Council consisting of one or more delegates of each contracting government.

2. The Council shall have the powers specifically assigned to it under the agreement and such other powers as are necessary for the effective operation of the agreement and for the carrying out of its provisions.

3. The Council may, by unanimity of the votes cast, delegate the exercise of any of its powers or functions to such persons or bodies as it thinks fit.

4. The Council shall elect, for such periods and upon such conditions as it may determine, a Chairman and a Vice Chairman, who need not be delegates of contracting governments.

5. The Council shall appoint a Secretary and such other employees as it considers necessary and determine their powers, duties, compensation and duration of employment.

6. The seat of the Council shall be in London unless the Council should otherwise determine.⁴

7. The Council shall meet in January and August of each year and at such other times as it may determine. The Chairman shall convene a meeting of the Council if so requested (a) by the Executive Committee or (b) by the delegates of five contracting governments or (c) by the delegates of contracting governments with a total of not less than ——— votes.

8. Notices of all meetings shall be dispatched so as to ensure receipt by delegations of contracting governments at least fourteen days in advance of the date fixed for the meeting.

9. Any contracting government may designate the delegation of any other contracting government to represent it and to vote on its behalf at any meeting of the Council or on any particular question. The terms of any such delegation of authority shall be communicated in writing by the delegating government to the Chairman of the Council.

10. The Council may take decisions, without holding a meeting, by correspondence between the Chairman and the delegations of the contracting

³ This article to be expanded, when further international consideration of the subject is possible, to include provisions for voting.

⁴ See Minutes of the final session, par. 6, *infra*, p. 41.

governments, unless any delegation objects. Any decisions so taken shall be communicated forthwith to all the delegations and shall be recorded in the minutes of the next meeting of the Council.

11. The Council shall make at the earliest practicable date all possible arrangements with international shipping controls to facilitate the exportation of wheat.

12. The Council shall instruct the Executive Committee (a) to coöperate with bodies engaged in the task of improving human nutrition, (b) to investigate the possibilities of increasing wheat consumption and (c) to examine and report upon any proposals made to the Council by any contracting government designed to facilitate the attainment of the objectives of the agreement.

13. The Council shall ascertain and make public the carry-over of wheat in Argentina, Australia, Canada and the United States of America at the end of each of their respective crop-years.

14. The Council shall, upon the request of any contracting government of an exporting country, investigate the possibility of meeting the needs of that country for wheat storage facilities to maintain in a good state of preservation such stocks of wheat as may accumulate prior to the coming into force of Article IV. The Council shall report to the contracting governments its findings together with its recommendations.

15. The Council shall at its regular August meeting make and publish, with such detail as it considers desirable, an estimate of the total volume of international trade in wheat and flour in the current quota-year and shall from time to time review that estimate and publish such revised estimates as it may make.

16. The Council shall publish an annual report on the operation of the agreement which shall include a summary of relevant statistics and such other material as the Council may determine. The Council may authorize the publication of such other reports as it considers appropriate. Reports shall be published in English and in any other languages that the Council may determine.

17. Pending the establishment of the Executive Committee under Article VIII, the Council shall itself perform the functions assigned by the agreement to that committee.

18. The Council may arrange to take over the assets and liabilities of the Wheat Advisory Committee upon the dissolution of that body on such terms as may be agreed with it.

ARTICLE VIII (The Executive Committee)

1. The Council shall, when it considers it desirable to do so, establish an Executive Committee which shall work under its general direction.

2. The Chairman of the Executive Committee shall be appointed by the Council for such period and upon such conditions as it may determine.

6. Consideration shall be given by each contracting government to the possibility of according to the funds of the Council and to the salaries paid by the Council to its employees who are nationals of other countries treatment in respect of taxation and of foreign exchange control no less favorable than that accorded by such government to the funds of any other government and to salaries paid by any other government to any of its accredited representatives who are its nationals.

7. The Council shall determine the disposal, on the termination of the agreement, of any funds which remain after meeting its obligations.

ARTICLE XI (Date upon which the Agreement comes into force) ⁵

ARTICLE XII (Duration of the Agreement)

This agreement shall remain in force for four years after the last day of the month of July following the date upon which it comes into force. The Council shall inquire of the contracting governments at least six months before the agreement is due to expire whether they desire to continue it and shall report to the contracting governments the results of such inquiry together with its recommendations.

ARTICLE XIII (Relation to other agreements)

1. So long as this agreement remains in force it shall prevail over any provisions inconsistent therewith which may be contained in any other agreement previously concluded between any of the contracting governments.

2. Should any contracting government be party to an agreement with a non-contracting government containing any provision inconsistent with this agreement, that contracting government shall take all reasonable steps to procure the necessary amendment of such agreement at the earliest date which it deems practicable.

ARTICLE XIV (Accessions)

This agreement shall at any time be open to accession by the government of any country on the terms contained therein so far as they are applicable to that government and on such other terms not inconsistent therewith as may be agreed with the Council. It shall accede as the government either of an exporting country or of an importing country as may be agreed with the Council and if it accedes as the government of an exporting country it shall have such basic export quota as may be agreed with the Council.

ARTICLE XV (Withdrawals)

1. The contracting government of any country which considers its national security endangered as a result of hostilities may apply to the Council

⁵ The text of this article to be determined when further international consideration of the subject is possible.

for the suspension of any of its obligations under Articles II, III, IV and V of this agreement. If the application is not granted within 30 days after the date thereof, such government may within 15 days after the end of that period withdraw from the agreement on written notice to the Council.

2. If it is shown to the satisfaction of the Council that the Government of Argentina, of Australia, of Canada or of the United States of America has failed to carry out its obligations under paragraph 1 of Article IV or paragraph 4 of Article V, the contracting government of any exporting country may within 90 days withdraw from the agreement on 30 days' written notice to the Council.

3. If the Government of Argentina, of Australia, of Canada or of the United States of America withdraws from the agreement, the agreement shall thereupon terminate, unless the Council, by three-fourths of the total votes held in the Council, decides to maintain the agreement with whatever modifications it may deem necessary.

ARTICLE XVI (Territories)

1. The rights and obligations under this agreement of the Government of Argentina apply to the customs territory thereof; those of the Government of Australia to Australia and her territories; those of the Government of Canada to the customs territory thereof; those of the Government of the United Kingdom of Great Britain and Northern Ireland to Great Britain and Northern Ireland; and those of the Government of the United States of America to the customs territory thereof.

2. In the event of the government of any other country acceding to the agreement under Article XIV, the Council shall agree with the said acceding government as to the territories to which the rights and obligations of the said acceding government under the agreement shall apply.

ARTICLE XVII (Definitions)

For the purposes of this agreement:

1. "Bushel" means sixty pounds avoirdupois.
2. "Carrying charges" means the costs incurred for storage, interest and insurance in holding wheat.
3. "Carry-over" means the aggregate of the stocks in any country, as ascertained by the Council under paragraph 13 of Article VII, of old wheat at the end of the crop-year held (a) in all elevators, warehouses and mills, (b) in transit or at railroad sidings and (c) on farms, except that in the case of Canada "carry-over" means in addition the stocks of wheat of Canadian origin held in bond in the United States of America.
4. "Council" means the International Wheat Council for which provision is made in Article VII.
5. "Crop-year" means in respect of Argentina and Australia, the period from December 1 to November 30; in respect of Canada, the period from

August 1 to July 31; and in respect of the United States of America, the period July 1 to June 30.

6. "Domestic requirements" means all use of wheat and flour during any crop-year within the territories of each contracting government for human and animal consumption, for industrial purposes, and for seed, and waste.

7. "Equivalent," with reference to the measurement of flour in terms of wheat, means a quantity calculated in the ratio of such number of pounds of flour to 100 pounds of wheat as the Council shall determine.

8. "Executive Committee" means the Executive Committee established by the International Wheat Council under Article VIII.

9. "Exporting country" means Argentina, Australia, Canada, the United States of America or any country that may accede as such to the agreement under Article XIV.

10. "Export quota" means basic export quota together with any secondary or supplementary export quota allocated under Article IV.

11. "Extraordinary use" means use which the Council is satisfied would not have taken place but for the governmental measures referred to in paragraph 6 of Article III.

12. "Gross exports" means the total quantity of wheat, including flour expressed in terms of its wheat equivalent, shipped from the territories of any government, except that in the case of Canada "gross exports" means the overseas clearances of Canadian wheat from seaboard ports in Canada and the United States of America, plus imports of wheat from Canada into the United States of America for consumption and for milling in bond, plus flour expressed in terms of its wheat equivalent shipped from Canadian territories.

13. "Gross imports" means the total quantity of wheat, including flour expressed in terms of its wheat equivalent, imported into the territories of any government.

14. "Importing country" means the United Kingdom or any country that may accede as such to the agreement under Article XIV.

15. "Net exports" means gross exports minus gross imports.

16. "Net imports" means gross imports minus gross exports.

17. "New crop" means wheat harvested not more than two months prior to the beginning of the current crop-year.

18. "Old wheat" means wheat harvested more than two months prior to the beginning of the current crop-year.

19. "Quota-year" means the period ending July 31 following the date upon which the agreement comes into force and thereafter the period from August 1 to July 31.

20. "Seaboard port" means any sea or river port at which a seagoing ship of 6,000 tons gross can load.

21. "Shipped" means transported in any manner.

22. "Territories" means territory, or group of territories, to which the

rights and obligations of the agreement apply in accordance with the provisions of Article XVI.

23. "The beginning of the seeding period for the next harvest" means in respect of Argentina, May 1; in respect of Australia and Canada, April 1; and in respect of the United States of America, September 1.

24. "Total volume of international trade in wheat and flour" means the aggregate of the net export from each country of the world.

25. "Wheat Advisory Committee" means the committee established under the Final Act of the Conference of Wheat Exporting and Importing Countries held in London at the Offices of the High Commissioner for Canada, from August 21 to 25, 1933.

26. "Yield" means quantity of production per unit of sown area.

MINUTES OF THE FINAL SESSION OF THE WASHINGTON WHEAT MEETING

Washington, April 22, 1942

The officials of the five countries participating in the Washington Wheat Meeting record as follows their understanding regarding certain provisions of the Memorandum of Agreement entered into pursuant to that meeting:

1. The arrangements referred to in paragraph 4 of the Memorandum, relating to the relief pool of wheat and to the control of production, mean the following provisions of the Draft Convention attached thereto: paragraph 3 of Article II (Production Control), Article VI (Relief Pool), VII (The Council) except paragraph 6, X (Finance), XVII (Definitions) and, should the Council at any time so decide, Article VIII (The Executive Committee).

2. The arrangements referred to in paragraph 5 of the Memorandum, relating to the control of production, stocks and exports and to the administration thereof, mean the following provisions of the Draft Convention, in addition to Articles VII (except paragraph 6), VIII, X and XVII referred to above: paragraphs 1 and 2 of Article II (Production Control), Article III (Stocks), Article IV (Export Control) except the provisions of paragraphs 10 and 12 relating to the obligations of importing countries since those provisions are not regarded as essential to the interim measures contemplated in the Memorandum, Article IX (Reports to the Council) and Article XVI (Territories).

3. The words "cessation of hostilities" in the Memorandum mean the earliest date at which none of the five countries is engaged in substantial belligerent operations.

4. The words "arrangements described in the attached Draft Convention" in paragraph 6 of the Memorandum mean the provisions of Article V of the Draft Convention.

5. The words "equivalent f.o.b. prices" which will be calculated for wheats of the other exporting countries under paragraph 6 of the Memorandum mean the prices of Argentine, Australian and United States wheats

which will be ascertained by the unanimous vote of the Council as equivalent to the last price negotiated by the United Kingdom for a bulk purchase of wheat from Canada.

6. The seat of the Council will be in Washington during the period in which the Memorandum of Agreement is in force, unless the Council should otherwise determine.

7. The Minutes of the Washington Wheat Meeting, together with the reports of its committees, will be available for the information of the Council during the period in which the Memorandum of Agreement is in force.

8. The English texts of the Memorandum of Agreement and of the present minutes have been initialled by Anselmo M. Viacava, Edwin McCarthy, Charles F. Wilson, Harold F. Carlill, and Leslie A. Wheeler, officials of Argentina, Australia, Canada, the United Kingdom and the United States, respectively, as competent experts in a position to reflect the views of their respective governments. The Memorandum, the Draft Convention and the present minutes will be transmitted in English and Spanish by the Government of the United States to the other four governments for their approval. So soon as the approval of the five governments has been notified to each of them the provisions of the Memorandum of Agreement will be deemed to come into effect and the Memorandum of Agreement together with the Draft Convention attached thereto and the present minutes will be made public.

For Argentina:

A. M. V.

For Australia:

E. McC.

For Canada:

C. F. W.

For the United Kingdom:

H. F. C.

For the United States:

L. A. W.

UNITED STATES

AN ACT

To provide for the expeditious naturalization of former citizens of the United States who have lost United States citizenship through service with the allied forces of the United States during the first or second World War.¹

Approved April 2, 1942

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 323 of the Act of October 14, 1940 (54 Stat. 1149),² entitled "An Act to revise and codify the nationality laws of the United States into a comprehensive nationality code," is hereby amended to read as follows:

¹ Public Law 513, 77th Cong. 2d Sess., Chap. 208 [S. 2339].

² This JOURNAL, Supp., Vol. 35 (1941), p. 93.

SEC. 323. A person who, while a citizen of the United States and during the first or second World War, entered the military or naval service of any country at war with a country with which the United States was or is at war, who has lost citizenship of the United States by reason of any oath or obligation taken for the purpose of entering such service, or by reason of entering or serving in such armed forces, and who intends to reside permanently in the United States, may be naturalized by taking before any naturalization court specified in subsection (a) of Section 301, the oaths prescribed by Section 335. Any such person who has lost citizenship of the United States during the second World War may, if he so desires, be naturalized by taking, before any diplomatic or consular officer of the United States abroad, the oaths prescribed by Section 335. For the purposes of this section, the second World War shall be deemed to have commenced on September 1, 1939, and shall continue until such time as the United States shall cease to be in a state of war. Certified copies of such oaths shall be sent by such diplomatic or consular officer or such court to the Department of State and to the Department of Justice.

FOREIGN AGENTS REGISTRATION ACT¹

Approved April 29, 1942

AN ACT

To amend the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes," approved June 8, 1938, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of June 8, 1938 (52 Stat. 631, U. S. C., Title 22, Sec. 233 (a) to Sec. 233 (g)), entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes,"² as amended, is hereby amended to read as follows:

POLICY AND PURPOSE

It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

¹ Public Law 532, 77th Cong. 2d Sess., Chap. 263 [S. 2399].

² Printed in this JOURNAL, Supp., Vol. 32 (1938), p. 207.

DEFINITIONS

SECTION 1. As used in and for the purposes of this Act—

(a) The term “person” includes an individual, partnership, association, corporation, organization, or any other combination of individuals;

(b) The term “foreign principal” includes—

(1) a government of a foreign country and a foreign political party;

(2) an individual affiliated or associated with, or supervised, directed, controlled, financed, or subsidized, in whole or in part, by any foreign principal defined in clause (1) of this Section 1 (b);

(3) a person outside of the United States, unless it is established that such person is an individual and is a citizen of and domiciled within the United States or that such person is not an individual, is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States, and has its principal place of business within the United States. Nothing in this clause (3) shall limit the operation of clause (5) of this Section 1 (b);

(4) a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country;

(5) a domestic partnership, association, corporation, organization, or other combination of individuals, subsidized directly or indirectly, in whole or in part, by any foreign principal defined in clause (1), (3), or (4) of this Section 1 (b);

(c) Except as provided in Section 1 (d) hereof, the term “agent of a foreign principal” includes—

(1) any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be whether or not pursuant to contractual relationship, a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal;

(2) any person who within the United States collects information for or reports information to a foreign principal; who within the United States solicits or accepts compensation, contributions, or loans, directly or indirectly, from a foreign principal; who within the United States solicits, disburses, dispenses, or collects compensation, contributions, loans, money, or anything of value, directly or indirectly, for a foreign principal; who within the United States acts at the order, request, or under the direction, of a foreign principal;

(3) any person who assumes or purports to act within the United States as an agent of a foreign principal in any of the respects set forth in clauses (1) and (2) of this Section 1 (c); and

(4) any person who is an officer or member of the active or reserve military, naval, or other armed forces of any foreign principal defined in clause (1) of Section 1 (b) hereof, or who is an officer of or employed

by any such foreign principal; and proof of any affiliation or employment, specified in this clause (4), of any person within a period of five years previous to the effective date of this Act shall create a rebuttable presumption that such person is an agent of a foreign principal;

(d) The term "agent of a foreign principal" does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the Postmaster General a sworn statement in compliance with Section 2 of the Act of August 24, 1912 (37 Stat. 553), as amended, published in the United States, solely by virtue of any bona fide news or journalistic activities, including the solicitation or acceptance of advertisements, subscriptions, or other compensation therefor, so long as it is at least 80 per centum beneficially owned by, and its officers and directors, if any, are citizens of the United States, and such news or press service or association, newspaper, magazine, periodical, or other publication, is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal defined in clause (1), (2), or (4) of Section 1 (b) hereof, or by any agent of a foreign principal required to register under this Act;

(e) The term "government of a foreign country" includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States;

(f) The term "foreign political party" includes any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof;

(g) The term "public-relations counsel" includes any person who engages directly or indirectly in informing, advising, or in any way representing a principal in any matter pertaining to political or public interests, policies, or relations;

(h) The term "publicity agent" includes any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind, including publica-

tion by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise;

(i) The term "information-service employee" includes any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country;

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. As used in this Section 1 (j) the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails;

(k) The term "registration statement" means the registration statement required to be filed with the Attorney General under Section 2 (a) hereof, and any supplements thereto required to be filed under Section 2 (b) hereof, and includes all documents and papers required to be filed therewith or amendatory thereof or supplemental thereto, whether attached thereto or incorporated therein by reference;

(l) The term "American republic" includes any of the states which were signatory to the Final Act of the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana, Cuba, July 30, 1940;

(m) The term "United States," when used in a geographical sense, includes the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, including the Philippine Islands, and all other places now or hereafter subject to the civil or military jurisdiction of the United States;

(n) The term "prints" means newspapers and periodicals, books, pam-

phlets, sheet music, visiting cards, address cards, printing proofs, engravings, photographs, pictures, drawings, plans, maps, patterns to be cut out, catalogs, prospectuses, advertisements, and printed, engraved, lithographed, or autographed notices of various kinds, and, in general, all impressions or reproductions obtained on paper or other material assimilable to paper, on parchment or on cardboard, by means of printing, engraving, lithography, autography, or any other easily recognizable mechanical process, with the exception of the copying press, stamps with movable or immovable type, and the typewriter.

REGISTRATION

SEC. 2. (a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by this Section 2 (a) and Section 2 (b) hereof or unless he is exempt from registration under the provisions of this Act. Except as hereinafter provided, every person who is an agent of a foreign principal on the effective date of this Act shall, within ten days thereafter and every person who becomes an agent of a foreign principal after the effective date of this Act shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath, on a form prescribed by the Attorney General, of which one copy shall be transmitted promptly by the Attorney General to the Secretary of State for such comment, if any, as the Secretary of State may desire to make from the point of view of the foreign relations of the United States. Failure of the Attorney General so to transmit such copy shall not be a bar to prosecution under this Act. The registration statement shall include the following, which shall be regarded as material for the purposes of this Act:

(1) Registrant's name, principal business address, and all other business addresses in the United States or elsewhere, and all residence addresses, if any;

(2) Status of the registrant; if an individual, nationality; if a partnership, name, residence addresses, and nationality of each partner and a true and complete copy of its articles of copartnership; if an association, corporation, organization, or any other combination of individuals, the name, residence addresses, and nationality of each director and officer and of each person performing the functions of a director or officer and a true and complete copy of its charter, articles of incorporation, association, constitution, and by-laws, and amendments thereto; a copy of every other instrument or document and a statement of the terms and conditions of every oral agreement relating to its organization, powers, and purposes; and a statement of its ownership and control;

(3) A comprehensive statement of the nature of registrant's business; a complete list of registrant's employees and a statement of the nature of the work of each, unless, and to the extent, this requirement

is waived in writing by the Attorney General; the name and address of every foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act; the character of the business or other activities of every such foreign principal, and, if any such foreign principal be other than a natural person, a statement of the ownership and control of each; and the extent, if any, to which each such foreign principal is supervised, directed, owned, controlled, financed, or subsidized, in whole or in part, by any government of a foreign country or foreign political party;

(4) Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; a comprehensive statement of the nature and method of performance of each such contract, and of the existing and proposed activity or activities engaged in or to be engaged in by the registrant as agent of a foreign principal for each such foreign principal;

(5) The nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received within the preceding sixty days from each such foreign principal, either as compensation or for disbursement or otherwise, and the form and time of each such payment and from whom received;

(6) A detailed statement of every activity which the registrant is performing or is assuming or purporting or has agreed to perform for himself or any other person other than a foreign principal and which requires his registration hereunder;

(7) The name, business, and residence addresses, and, if an individual, the nationality, of any person who has within the preceding sixty days contributed or paid money or anything of value to the registrant in connection with any of the activities referred to in clause (6) of this Section 2 (a) and the amount or value of the same;

(8) A detailed statement of the money and other things of value spent or disposed of by the registrant during the preceding sixty days in furtherance of or in any way in connection with activities which require his registration hereunder and which have been undertaken by him either as an agent of a foreign principal or for himself or any other person;

(9) Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is performing or assuming or purporting or has agreed to perform for himself or for a foreign principal or for any person other than a foreign principal any activities which require his registration hereunder;

(10) Such other statements, information, or documents pertinent to the purposes of this Act as the Attorney General, having due regard for the national security and the public interest, may from time to time require;

(11) Such further statements and such further copies of documents as are necessary to make the statements made in the registration statement and supplements thereto, and the copies of documents furnished therewith, not misleading.

(b) Every agent of a foreign principal who has filed a registration statement required by Section 2 (a) hereof shall, within thirty days after the expiration of each period of six months succeeding such filing, file with the Attorney General a supplement thereto under oath, on a form prescribed by the Attorney General, which shall set forth with respect to such preceding six months' period such facts as the Attorney General, having due regard for the national security and the public interest, may deem necessary to make the information required under Section 2 hereof accurate, complete, and current with respect to such period. In connection with the information furnished under clauses (3), (4), (6), and (9) of Section 2 (a) hereof, the registrant shall give notice to the Attorney General of any changes therein within ten days after such changes occur. If the Attorney General, having due regard for the national security and the public interest, determines that it is necessary to carry out the purposes of this Act, he may, in any particular case, require supplements to the registration statement to be filed at more frequent intervals in respect to all or particular items of information to be furnished.

(c) The registration statement and supplements thereto shall be executed under oath as follows: If the registrant is an individual, by him; if the registrant is a partnership, by the majority of the members thereof; if the registrant is a person other than an individual or a partnership, by a majority of the officers thereof or persons performing the functions of officers or by a majority of the board of directors thereof or persons performing the functions of directors, if any.

(d) The fact that a registration statement or supplement thereto has been filed shall not necessarily be deemed a full compliance with this Act and the regulations thereunder on the part of the registrant; nor shall it indicate that the Attorney General has in any way passed upon the merits of such registration statement or supplement thereto; nor shall it preclude prosecution, as provided for in this Act, for willful failure to file a registration statement or supplement thereto when due or for a willful false statement of a material fact therein or the willful omission of a material fact required to be stated therein or the willful omission of a material fact or copy of a material document necessary to make the statements made in a registration statement and supplements thereto, and the copies of documents furnished therewith, not misleading.

(e) If any agent of a foreign principal, required to register under the provisions of this Act, has previously thereto registered with the Attorney General under the provisions of the Act of October 17, 1940 (54 Stat. 1201), the Attorney General, in order to eliminate inappropriate duplication, may permit the incorporation by reference in the registration statement or supplements thereto filed hereunder of any information or documents previously filed by such agent of a foreign principal under the provisions of the Act of October 17, 1940 (54 Stat. 1201).

EXEMPTIONS

SEC. 3. The requirements of Section 2 (a) hereof shall not apply to the following agents of foreign principals:

(a) A duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, while said officer is engaged exclusively in activities which are recognized by the Department of State as being within the scope of the functions of such officer;

(b) Any official of a foreign government, if such government is recognized by the United States, who is not a public-relations counsel, publicity agent, information-service employee, or a citizen of the United States, whose name and status and the character of whose duties as such official are of public record in the Department of State, while said official is engaged exclusively in activities which are recognized by the Department of State as being within the scope of the functions of such official;

(c) Any member of the staff of, or any person employed by, a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, other than a public-relations counsel, publicity agent, or information-service employee, whose name and status and the character of whose duties as such member or employee are of public record in the Department of State, while said member or employee is engaged exclusively in the performance of activities which are recognized by the Department of State as being within the scope of the functions of such member or employee;

(d) Any person engaging or agreeing to engage only in private, non-political, financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal or in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering, if such solicitation or collection of funds and contributions is in accordance with and subject to the provisions of the Act of November 4, 1939, as amended (54 Stat. 48), and such rules and regulations as may be prescribed thereunder;

(e) Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts;

(f) Any person, or employee of such person, whose foreign principal is a government of a foreign country the defense of which the President deems vital to the defense of the United States while, (1) such person or employee engages only in activities which are in furtherance of the policies, public interest, or national defense both of such government and of the Government of the United States, and are not intended to conflict with any of the domestic or foreign policies of the Government of the United States, (2) each communication or expression by such person or employee which he intends to, or has reason to believe will, be published, disseminated, or circulated among any section of the public, or portion thereof, within the United States, is a part of such activities and is believed by such person to be truthful and accurate and the identity of such person as an agent of such foreign principal is disclosed therein, and (3) such government of a foreign country furnishes to the Secretary of State for transmittal to, and retention for the duration of this Act by, the Attorney General such information as to the identity and activities of such person or employee at such times as the Attorney General may require. Upon notice to the Government of which such person is an agent or to such person or employee, the Attorney General, having due regard for the public interest and national defense, may, with the approval of the Secretary of State, and shall, at the request of the Secretary of State, terminate in whole or in part the exemption herein of any such person or employee.

FILING AND LABELING OF POLITICAL PROPAGANDA

SEC. 4. (a) Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this Act and who transmits or causes to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, send to the Librarian of Congress two copies thereof and file with the Attorney General one copy thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

(b) It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this Act to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with,

or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth that the person transmitting such political propaganda or causing it to be transmitted is registered under this Act with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of each of his foreign principals; that, as required by this Act, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the Act does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate.

(c) The copies of political propaganda required by this Act to be sent to the Librarian of Congress shall be available for public inspection under such regulations as he may prescribe.

(d) For purposes of the Library of Congress, other than for public distribution, the Secretary of the Treasury and the Postmaster General are authorized, upon the request of the Librarian of Congress, to forward to the Library of Congress fifty copies, or as many fewer thereof as are available, of all foreign prints determined to be prohibited entry under the provisions of Section 305 of Title III of the Act of June 17, 1930 (46 Stat. 688), and of all foreign prints excluded from the mails under authority of Section 1 of Title XII of the Act of June 15, 1917 (40 Stat. 230).

Notwithstanding the provisions of Section 305 of Title III of the Act of June 17, 1930 (46 Stat. 688), and of Section 1 of Title XII of the Act of June 15, 1917 (40 Stat. 230), the Secretary of the Treasury is authorized to permit the entry and the Postmaster General is authorized to permit the transmittal in the mails of foreign prints imported for governmental purposes by authority or for the use of the United States or for the use of the Library of Congress.

BOOKS AND RECORDS

SEC. 5. Every agent of a foreign principal registered under this Act shall keep and preserve while he is an agent of a foreign principal such books of account and other records with respect to all his activities, the disclosure of which is required under the provisions of this Act, as the Attorney General, having due regard for the national security and the public interest, may by regulation prescribe as necessary or appropriate for the enforcement of the provisions of this Act and shall preserve the same for a period of three years

following the termination of such status. Until regulations are in effect under this section every agent of a foreign principal shall keep books of account and shall preserve all written records with respect to his activities. Such books and records shall be open at all reasonable times to the inspection of any official charged with the enforcement of this Act. It shall be unlawful for any person willfully to conceal, destroy, obliterate, mutilate, or falsify, or to attempt to conceal, destroy, obliterate, mutilate, or falsify, or to cause to be concealed, destroyed, obliterated, mutilated, or falsified, any books or records required to be kept under the provisions of this section.

PUBLIC EXAMINATION OF OFFICIAL RECORDS

SEC. 6. The Attorney General shall retain in permanent form one copy of all registration statements and all statements concerning the distribution of political propaganda furnished under this Act, and the same shall be public records and open to public examination and inspection at such reasonable hours, under such regulations, as the Attorney General may prescribe, and copies of the same shall be furnished to every applicant at such reasonable fee as the Attorney General may prescribe. The Attorney General may withdraw from public examination the registration statement and other statements of any agent of a foreign principal whose activities have ceased to be of a character which requires registration under the provisions of this Act.

LIABILITY OF OFFICERS

SEC. 7. Each officer, or person performing the functions of an officer, and each director, or person performing the functions of a director, of an agent of a foreign principal which is not an individual shall be under obligation to cause such agent to execute and file a registration statement and supplements thereto as and when such filing is required under Sections 2 (a) and 2 (b) hereof and shall also be under obligation to cause such agent to comply with all the requirements of Sections 4 (a), 4 (b), and 5 and all other requirements of this Act. In case of failure of any such agent of a foreign principal to comply with any of the requirements of this Act, each of its officers, or persons performing the functions of officers, and each of its directors, or persons performing the functions of directors, shall be subject to prosecution therefor.

ENFORCEMENT AND PENALTIES

SEC. 8. (a) Any person who—

(1) willfully violates any provision of this Act or any regulation thereunder, or

(2) in any registration statement or supplement thereto or in any statement under Section 4 (a) hereof concerning the distribution of political propaganda or in any other document filed with or furnished

to the Attorney General under the provisions of this Act willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading, shall, upon conviction thereof, be punished by a fine of not more than \$10,000 or by imprisonment for not more than five years, or both.

(b) In any proceeding under this Act in which it is charged that a person is an agent of a foreign principal with respect to a foreign principal outside of the United States, proof of the specific identity of the foreign principal shall be permissible but not necessary.

(c) Any alien who shall be convicted of a violation of, or a conspiracy to violate, any provision of this Act or any regulation thereunder shall be subject to deportation in the manner provided by Sections 19 and 20 of the Immigration Act of 1917 (39 Stat. 889, 890), as amended.

(d) The Postmaster General may declare to be nonmailable any communication or expression falling within clause (2) of Section 1 (j) hereof in the form of prints or in any other form reasonably adapted to, or reasonably appearing to be intended for, dissemination or circulation among two or more persons, which is offered or caused to be offered for transmittal in the United States mails to any person or persons in any other American republic by any agent of a foreign principal, if the Postmaster General is informed in writing by the Secretary of State that the duly accredited diplomatic representative of such American republic has made written representation to the Department of State that the admission or circulation of such communication or expression in such American republic is prohibited by the laws thereof and has requested in writing that its transmittal thereto be stopped.

APPLICABILITY OF ACT

SEC. 9. This Act shall be applicable in the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, including the Philippine Islands, and all other places now or hereafter subject to the civil or military jurisdiction of the United States.

RULES AND REGULATIONS

SEC. 10. The Attorney General may at any time make, prescribe, amend, and rescind such rules, regulations, and forms as he may deem necessary to carry out the provisions of this Act.

REPORTS TO THE CONGRESS

SEC. 11. The Attorney General shall, from time to time, make a report to the Congress concerning the administration of this Act, including the nature, sources, and content of political propaganda disseminated or distributed.

SEPARABILITY OF PROVISIONS

SEC. 12. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 13. This Act is in addition to and not in substitution for any other existing statute.

SHORT TITLE

SEC. 14. This Act may be cited as the "Foreign Agents Registration Act of 1938, as amended."

TRANSFER OF ADMINISTRATION

SEC. 2. *Upon the effective date of this Act, all powers, duties, and functions of the Secretary of State under the Act of June 8, 1938 (52 Stat. 631), as amended, shall be transferred to and become vested in the Attorney General, together with all property, books, records, and unexpended balances of appropriations used by or available to the Secretary of State for carrying out the functions devolving on him under the above-cited Act. All rules, regulations, and forms which have been issued by the Secretary of State pursuant to the provisions of said Act, and which are in effect, shall continue in effect until modified, superseded, revoked, or repealed.*

EFFECTIVE DATE

SEC. 3. *This Act shall take effect on the sixtieth day after the date of its approval, except that prior to such sixtieth day the Attorney General may make, prescribe, amend, and rescind such rules, regulations, and forms as may be necessary to carry out the provisions of this Act.*

UNITED STATES

PROCLAMATION REGARDING ALIEN ENEMIES

No. 2537 — January 14, 1942¹

Whereas Section 21 of Title 50 of the United States Code provides as follows:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and

¹ Federal Register, Jan. 17, 1942, Vol. 7, p. 329.

to establish any other regulations which are found necessary in the premises and for the public safety.

Whereas by Sections 22, 23, and 24 of Title 50 of the United States Code further provision is made relative to alien enemies;

Whereas by Proclamation No. 2525 ² of December 7, 1941, and Proclamations Nos. 2526 ² and 2527 ² of December 8, 1941, I prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense to prescribe regulations additional and supplemental to such regulations:

Now, Therefore, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the United States Code, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations of December 7, 1941, and December 8, 1941:

All alien enemies within the continental United States, Puerto Rico, and the Virgin Islands are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply for and acquire certificates of identification; and the Attorney General is hereby authorized and directed to provide, as speedily as may be practicable, for the receiving of such applications and for the issuance of appropriate identification certificates, and to make such rules and regulations as he may deem necessary for effecting such identifications; and all alien enemies and all other persons are hereby required to comply with such rules and regulations. The Attorney General in carrying out such identification procedure, is hereby authorized to utilize such agents, agencies, officers, and departments of the United States and of the several states, territories, dependencies, and municipalities thereof and of the District of Columbia as he may select for the purpose, and all such agents, agencies, officers, and departments are hereby granted full authority for all acts done by them in the execution of this regulation when acting by the direction of the Attorney General. After the date or dates fixed by the Attorney General for completion of such identification procedure, every alien enemy within the limits of the continental United States, Puerto Rico, or the Virgin Islands shall at all times have his identification card on his person.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of January in the year of [SEAL] our Lord nineteen hundred and forty-two, and of the Independence of the United States of America the one hundred and sixty-sixth.

FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL,

Secretary of State.

² Printed in this JOURNAL, Supplement, Vol. 36 (1942), p. 236.

CHINA-GREAT BRITAIN

TREATY FOR THE RELINQUISHMENT OF EXTRATERRITORIAL RIGHTS IN CHINA AND THE REGULATION OF RELATED MATTERS *

WITH EXCHANGE OF NOTES AND AGREED MINUTES

Signed at Chungking, January 11, 1943

His Majesty The King of Great Britain, Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Excellency the President of the National Government of the Republic of China;

Being desirous of defining more clearly, in a spirit of friendship, the general relations between them and for this purpose to settle certain matters relating to jurisdiction in China;

Have decided to conclude a treaty for this purpose and to that end have appointed as their plenipotentiaries:

His Majesty The King of Great Britain, Ireland and of the British Dominions beyond the Seas, Emperor of India (hereinafter referred to as His Majesty The King):

For the United Kingdom of Great Britain and Northern Ireland:

His Excellency Sir Horace James Seymour, K.C.M.G., C.V.O., His Majesty's Ambassador Extraordinary and Plenipotentiary to the Republic of China;

For India:

Hugh Edward Richardson, Esq., an officer of the Indian Political Service;

His Excellency the President of the National Government of the Republic of China:

His Excellency Dr. Tse Vung Soong, Minister for Foreign Affairs for the Republic of China;

Who having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

ARTICLE 1

(i) The territories of the high contracting parties to which the present treaty applies are, on the part of His Majesty The King, the United Kingdom of Great Britain and Northern Ireland, India, all colonies, overseas territories, protectorates of His Majesty, all territories under his protection or suzerainty and all mandated territories in respect of which the mandate is exercised by his Government in the United Kingdom; and, on the part of His Excellency the President of the National Government of the Republic of China, all the territories of the Republic of China. Any reference in

* Parliamentary Papers, Cmd. 6417. China No. 1 (1943).

subsequent articles of the present treaty to the territories of one or the other high contracting party shall be deemed to relate to those territories of that high contracting party to which the present treaty applies.

(ii) In the present treaty, the term "nationals of the one (or of the other) high contracting party" shall in relation to His Majesty The King mean all British subjects and all British-protected persons belonging to the territories to which the present treaty applies; and in relation to the Republic of China, all nationals of the Republic of China.

(iii) The expression "companies of the one (or of the other) high contracting party" shall for the purpose of the present treaty be interpreted as meaning limited liability and other companies, partnerships and associations constituted under the law of the territories of that high contracting party to which the present treaty applies.

ARTICLE 2

All those provisions of treaties or agreements in force between His Majesty The King and His Excellency the President of the National Government of the Republic of China which authorize His Majesty or his representatives to exercise jurisdiction over nationals or companies of His Majesty in the territory of the Republic of China are hereby abrogated. The nationals and companies of His Majesty The King shall be subject in the territory of the Republic of China to the jurisdiction of the Government of the Republic of China, in accordance with the principles of international law and practice.

ARTICLE 3

(i) His Majesty The King considers that the final protocol concluded at Peking, on the 7th September, 1901,¹ between the Chinese Government and other Governments, including His Majesty's Government in the United Kingdom, should be terminated, and agrees that the rights accorded to His Majesty's Government in the United Kingdom under that protocol and under the agreements supplementary thereto shall cease.

(ii) His Majesty's Government in the United Kingdom will coöperate with the Government of the Republic of China for the reaching of any necessary agreements with the other Governments concerned for the transfer to the Government of the Republic of China of the administration and control of the Diplomatic Quarter at Peiping, including the official assets and the official obligations of the Diplomatic Quarter, it being mutually understood that the Government of the Republic of China, in taking over administration and control of the Diplomatic Quarter, will make provision for the assumption and discharge of the official obligations and liabilities of the Diplomatic Quarter and for the recognition and protection of all legitimate rights therein.

¹ Treaty Series No. 17 (1902), Cd. 1390; this JOURNAL, Supp., Vol. 1 (1907), p. 388.

(iii) The Government of the Republic of China shall accord to His Majesty's Government in the United Kingdom a continued right to use for official purposes the land which has been allocated to His Majesty's Government in the United Kingdom in the Diplomatic Quarter in Peiping, on parts of which are located buildings belonging to His Majesty's Government in the United Kingdom.

ARTICLE 4

(i) His Majesty The King considers that the International Settlements at Shanghai and Amoy should revert to the administration and control of the Government of the Republic of China and agrees that the rights accorded to His Majesty in relation to those settlements shall cease.

(ii) His Majesty's Government in the United Kingdom will coöperate with the Government of the Republic of China for the reaching of any necessary agreements with the other Governments concerned for the transfer to the Government of the Republic of China of the administration and control of the International Settlements at Shanghai and Amoy, including the official assets and the official obligations of those settlements, it being mutually understood that the Government of the Republic of China, in taking over administration and control of those settlements, will make provision for the assumption and discharge of the official obligations and liabilities of those settlements and for the recognition and protection of all legitimate rights therein.

(iii) His Majesty The King agrees that the British Concession (including the whole British Municipal Area) at Tientsin and the British Concession at Canton shall revert to the administration and control of the Government of the Republic of China and that the rights accorded to His Majesty in relation to those concessions shall cease.

(iv) The administration and control of the British Concession (including the whole British Municipal Area) at Tientsin and the British Concession at Canton including their official assets and official obligations shall be transferred to the Government of the Republic of China, it being mutually understood that the Government of the Republic of China in taking over administration and control of those concessions will make provision for the assumption and discharge of the official obligations and liabilities of those concessions and for the recognition and protection of all legitimate rights therein.

ARTICLE 5

(i) In order to obviate any questions as to existing rights in respect of or as to existing titles to real property in the territory of the Republic of China possessed by nationals and companies of His Majesty The King, or by His Majesty's Government in the United Kingdom, and in particular questions which might arise from the abrogation of the provisions of treaties

and agreements provided for in Article 2 of the present treaty, the high contracting parties agree that such existing rights or titles shall be indefeasible and shall not be questioned upon any ground except upon proof, established through due process of law, of fraud or of fraudulent or dishonest practices in the acquisition of such rights or titles, it being understood that no right or title shall be rendered invalid by virtue of any subsequent change in the original procedure through which it was acquired. It is also agreed that the exercise of these rights or titles shall be subject to the laws and regulations of the Republic of China concerning taxation, national defence and the right of eminent domain; and that no such rights or titles may be alienated to the Government or nationals (including companies) of any third country without the express consent of the Government of the Republic of China.

(ii) The high contracting parties also agree that if it should be the desire of the Government of the Republic of China to replace by new deeds of ownership existing leases in perpetuity or other documentary evidence relating to real property held by nationals or companies of His Majesty The King or by His Majesty's Government in the United Kingdom, the replacement shall be made by the Chinese authorities without charges of any sort and the new deeds of ownership shall fully protect the holders of such leases or other documentary evidence, and their legal heirs and assigns without diminution of their prior rights and interests, including the right of alienation.

(iii) The high contracting parties agree further that nationals or companies of His Majesty The King or His Majesty's Government in the United Kingdom shall not be required or asked by the Chinese authorities to make any payments of fees in connection with land transfers for or with relation to any period prior to the effective date of this treaty.

ARTICLE 6

His Majesty The King having long accorded rights to nationals of the Republic of China within each of the territories of His Majesty to travel, reside and carry on commerce throughout the whole extent of the territory, the Government of the Republic of China agree to accord similar rights to nationals of His Majesty within the territory of the Republic of China. Each high contracting party will endeavor to accord in his territories to nationals and companies of the other high contracting party in regard to all legal proceedings and in matters relating to the administration of justice, the levying of taxes and requirements in connection therewith treatment not less favorable than that accorded to his own nationals and companies.

ARTICLE 7

The consular officers of one high contracting party, duly provided with *exequaturs*, shall be permitted to reside in such ports, places and cities of

the territories of the other high contracting party as may be agreed upon. The consular officers of one high contracting party shall have the right within their districts in the territories of the other high contracting party to interview, communicate with and to advise the nationals and companies of the former high contracting party, and the nationals and companies of one high contracting party within the territories of the other high contracting party shall have the right at all times to communicate with the consular officers of the former high contracting party. The consular officers of one high contracting party in the territories of the other shall be informed immediately by the appropriate local authorities when any of their nationals are arrested or detained in their consular districts by the local authorities. They shall have the right to visit within the limits of their districts any of their nationals who are under arrest or awaiting trial in prison. Communications from the nationals of one high contracting party in prison in the territories of the other high contracting party addressed to the consular officers of the former high contracting party will be forwarded to the appropriate consular officer by the local authorities. Consular officers of one high contracting party shall be accorded in the territories of the other high contracting party the rights, privileges and immunities enjoyed by consular officers under modern international usage.

ARTICLE 8

(i) The high contracting parties will enter into negotiations for the conclusion of a comprehensive modern treaty or treaties of friendship, commerce, navigation and consular rights upon the request of either of them or in any case within six months after the cessation of the hostilities in the war against the common enemies in which they are both now engaged. The treaty or treaties to be thus negotiated will be based upon the principles of international law and practice as reflected in modern international procedure and in the modern treaties which each of the high contracting parties have respectively concluded with other Powers in recent years.

(ii) Pending the conclusion of the comprehensive treaty or treaties referred to in the preceding paragraph, if any questions affecting the rights in the territory of the Republic of China of the nationals or companies of His Majesty The King, or of His Majesty's Government in the United Kingdom or of the Government of India, should arise in future and if these questions are not covered by the present treaty and exchange of notes or by the provisions of the existing treaties, conventions and agreements between the high contracting parties which are not abrogated by or inconsistent with the present treaty and exchange of notes, such questions shall be discussed by representatives of the high contracting parties and shall be decided in accordance with the generally accepted principles of international law and with modern international practice.

ARTICLE 9

The present treaty shall be ratified and the instruments of ratification shall be exchanged at Chungking as soon as possible. The treaty shall come into force on the day of the exchange of ratifications.

In witness whereof the above-mentioned plenipotentiaries have signed the present treaty and affixed thereto their seals.

Done at Chungking this 11th day of January, 1943, corresponding to the 11th day of the first month of the thirty-second year of the Republic of China, in duplicate in English and Chinese, both texts being equally authentic.

(L.S.) H. J. SEYMOUR

(L.S.) H. E. RICHARDSON

(L.S.) TSE VUNG SOONG

EXCHANGE OF NOTES²

A

Note from Dr. Tse Vung Soong, Chinese Minister for Foreign Affairs, to Sir Horace James Seymour

CHUNGKING, January 11, 1943

Sir,

During the negotiations for the treaty signed today between His Excellency the President of the National Government of the Republic of China and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, for the United Kingdom of Great Britain and Northern Ireland and India, a number of questions have been discussed upon which agreement has been reached. The understandings reached with regard to these points are recorded in the Annex to the present note, which annex shall be considered as an integral part of the Treaty signed today and shall be considered effective upon the date of entrance into force of that treaty. I should be glad if Your Excellency would confirm these understandings on behalf of His Majesty's Government in the United Kingdom.

I have, &c.

TSE VUNG SOONG

His Excellency Sir H. J. SEYMOUR, K.C.M.G., C.V.O.,
His Majesty's Ambassador at Chungking.

ANNEX

1. With reference to Article 2 and Article 8 (ii) of the treaty, it is understood that—

(a) His Majesty The King relinquishes all existing treaty rights relating to the system of treaty ports in China. His Excellency the President of the National Government of the Republic of China and His Majesty The King

² A similar exchange of notes took place between the Chinese Minister for Foreign Affairs and the Plenipotentiary for India.

mutually agree that merchant vessels of one high contracting party shall be permitted freely to come to ports, places and waters in the territories of the other high contracting party which are or may be opened to overseas merchant shipping and that treatment accorded to such vessels in such ports, places and waters shall be no less favorable than that accorded to national vessels and shall be as favorable as that accorded to vessels of any third country. The term "vessels" of a high contracting party means all vessels registered under the law of any of the territories of that high contracting party to which the treaty signed this day applies.

(b) His Majesty The King relinquishes all existing treaty rights relating to the special courts in the International Settlements at Shanghai and Amoy.

(c) His Majesty The King relinquishes all existing rights with regard to the employment of foreign pilots in the ports of the territories of the Republic of China.

(d) His Majesty The King relinquishes all existing treaty rights relating to the entry of his naval vessels into the waters of the Republic of China, and the Government of the Republic of China and His Majesty's Government in the United Kingdom shall extend to each other in connection with the visits of warships of one high contracting party to the ports of the other high contracting party mutual courtesy in accordance with ordinary international usage.

(e) His Majesty The King relinquishes any right to claim the appointment of a British subject as Inspector-General of the Chinese Customs.

(f) All the courts of His Majesty The King which have hitherto been sitting in the territories of the Republic of China having been closed down in accordance with Article 2 of the treaty signed this day, the orders, decrees, judgments and other acts of any of His Majesty's courts in China shall be considered as *res judicata*, and shall when necessary be enforced by the Chinese authorities: further, any cases pending before any of His Majesty's courts in China at the time of the coming into effect of the treaty shall, if the plaintiff or petitioner so desires, be remitted to the appropriate courts of the Government of the Republic of China, which shall proceed to dispose of them as expeditiously as possible and in so doing shall, so far as practicable, apply the law which the court of His Majesty would have applied.

(g) His Majesty The King relinquishes the special rights which his vessels have been accorded with regard to coasting trade and inland navigation in the waters of the Republic of China, and the Government of the Republic of China are prepared to take over any properties of His Majesty's nationals or companies which have been used for the purposes of these trades and which the owners may wish to dispose of, and to pay adequate compensation therefor. The Government of the Republic of China relinquish the special rights which have been accorded to Chinese vessels in respect of navigation on the River Irrawaddy under Article 12 of the convention signed at London on the 1st March, 1894.³ Should one high contracting party accord in any of his

³ Treaty Series No. 19 (1894), C. 7547.

territories the right of coasting trade or inland navigation to vessels of any third country, such rights would similarly be accorded to vessels of the other high contracting party provided that the latter high contracting party permits vessels of the former high contracting party to engage in the coasting trade or inland navigation of his territories. Coasting trade and inland navigation are excepted from the requirement of national treatment and are to be regulated according to the laws of each high contracting party in relation thereto. It is agreed, however, that vessels of either high contracting party shall enjoy within the territories of the other high contracting party with respect to coasting trade and inland navigation treatment as favorable as that accorded to vessels of any third country subject to the above-mentioned proviso.

2. With reference to the last sentence of Article 5 (i) of the treaty, the Government of the Republic of China declare that the restriction on the right of alienation of existing rights and titles to real property referred to in that article will be applied by the Chinese authorities in an equitable manner and that if and when the Chinese Government decline to assent to a proposed transfer, the Chinese Government will, in a spirit of justice and with a view to precluding loss on the part of nationals or companies of His Majesty The King whose interests are affected, undertake, if so requested by the national or company of His Majesty to whom permission to alienate has been refused, to take over the rights and title in question and pay adequate compensation therefor.

3. It is understood that the abolition of the system of treaty ports will not affect existing property rights, and that nationals of each high contracting party will enjoy the right to acquire and hold real property throughout the territories of the other high contracting party in accordance with the conditions and requirements prescribed in the laws and regulations of that high contracting party.

4. It is further agreed that questions which may affect the sovereignty of the Republic of China and which are not covered by the present treaty or by the preceding provisions of the present note, shall be discussed by representatives of the Government of the Republic of China and His Majesty's Government in the United Kingdom and decided in accordance with generally accepted principles of international law and modern international practice.

B

Note from Sir Horace James Seymour to Dr. Tse Vung Soong, Chinese Minister for Foreign Affairs

BRITISH EMBASSY, CHUNGKING, January 11, 1943

I have the honor to acknowledge the receipt of your Excellency's letter of today's date reading as follows:

[As in A]

I have the honor on behalf of His Majesty's Government in the United Kingdom to confirm the understandings reached between us as recorded in the annex to Your Excellency's note, which annex shall be considered as an integral part of the treaty signed today and shall be considered as effective upon the date of entrance into force of that treaty.

I have, &c.

H. J. SEYMOUR

His Excellency Dr. TSE VUNG SOONG,
*Minister for Foreign Affairs of the
Republic of China, Chungking.*

AGREED MINUTE

1. With reference to paragraph 1 (a) of the annex to the note from the Chinese Minister for Foreign Affairs to His Majesty's Ambassador in connection with the treaty signed today, it is understood that both high contracting parties reserve the right to close any port to all overseas merchant shipping for reasons of national security.

2. With reference to paragraph 1 (g) of the annex to the note from the Chinese Minister for Foreign Affairs to His Majesty's Ambassador in connection with the treaty signed today, His Majesty's Ambassador informed the Chinese Government that trade between India on the one hand and Burma or Ceylon on the other has always been regarded as coasting trade.

H. J. SEYMOUR

TSE VUNG SOONG

CHINA-UNITED STATES

TREATY FOR THE RELINQUISHMENT OF EXTRATERRITORIAL RIGHTS IN CHINA AND THE
REGULATION OF RELATED MATTERS*

WITH SUPPLEMENTARY EXCHANGE OF NOTES

Signed at Washington, January 11, 1943

The United States of America and the Republic of China, desirous of emphasizing the friendly relations which have long prevailed between their two peoples and of manifesting their common desire as equal and sovereign States that the high principles in the regulation of human affairs to which they are committed shall be made broadly effective, have resolved to conclude a treaty for the purpose of adjusting certain matters in the relations of the two countries, and have appointed as their plenipotentiaries:

The President of the United States of America,

Mr. Cordell Hull, Secretary of State of the United States of America,
and

* Department of State Bulletin, March 20, 1943, Vol. VIII, p. 240.

The President of the National Government of the Republic of China, Dr. Wei Tao-ming, Ambassador Extraordinary and Plenipotentiary of the Republic of China to the United States of America;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following articles:

ARTICLE I

All those provisions of treaties or agreements in force between the United States of America and the Republic of China which authorize the Government of the United States of America or its representatives to exercise jurisdiction over nationals of the United States of America in the territory of the Republic of China are hereby abrogated. Nationals of the United States of America in such territory shall be subject to the jurisdiction of the Government of the Republic of China in accordance with the principles of international law and practice.

ARTICLE II

The Government of the United States of America considers that the Final Protocol concluded at Peking on September 7, 1901, between the Chinese Government and other governments, including the Government of the United States of America, should be terminated and agrees that the rights accorded to the Government of the United States of America under that protocol and under agreements supplementary thereto shall cease.

The Government of the United States of America will coöperate with the Government of the Republic of China for the reaching of any necessary agreements with other governments concerned for the transfer to the Government of the Republic of China of the administration and control of the Diplomatic Quarter at Peiping, including the official assets and the official obligations of the Diplomatic Quarter, it being mutually understood that the Government of the Republic of China in taking over administration and control of the Diplomatic Quarter will make provision for the assumption and discharge of the official obligations and liabilities of the Diplomatic Quarter and for the recognition and protection of all legitimate rights therein.

The Government of the Republic of China hereby accords to the Government of the United States of America a continued right to use for official purposes the land which has been allocated to the Government of the United States of America in the Diplomatic Quarter in Peiping, on parts of which are located buildings belonging to the Government of the United States of America.

ARTICLE III

The Government of the United States of America considers that the International Settlements at Shanghai and Amoy should revert to the

administration and control of the Government of the Republic of China and agrees that the rights accorded to the Government of the United States of America in relation to those Settlements shall cease.

The Government of the United States of America will coöperate with the Government of the Republic of China for the reaching of any necessary agreements with other governments concerned for the transfer to the Government of the Republic of China of the administration and control of the International Settlements at Shanghai and Amoy, including the official assets and the official obligations of those Settlements, it being mutually understood that the Government of the Republic of China in taking over administration and control of those Settlements will make provision for the assumption and discharge of the official obligations and liabilities of those Settlements and for the recognition and protection of all legitimate rights therein.

ARTICLE IV

In order to obviate any questions as to existing rights in respect of or as to existing titles to real property in territory of the Republic of China possessed by nationals (including corporations or associations), or by the Government, of the United States of America, particularly questions which might arise from the abrogation of the provisions of treaties or agreements as stipulated in Article I, it is agreed that such existing rights or titles shall be indefeasible and shall not be questioned upon any ground except upon proof, established through due process of law, of fraud or of fraudulent or other dishonest practices in the acquisition of such rights or titles, it being understood that no right or title shall be rendered invalid by virtue of any subsequent change in the official procedure through which it was acquired. It is also agreed that these rights or titles shall be subject to the laws and regulations of the Republic of China concerning taxation, national defense, and the right of eminent domain, and that no such rights or titles may be alienated to the government or nationals (including corporations or associations) of any third country without the express consent of the Government of the Republic of China.

It is also agreed that if it should be the desire of the Government of the Republic of China to replace, by new deeds of ownership, existing leases in perpetuity or other documentary evidence relating to real property held by nationals, or by the Government, of the United States of America, the replacement shall be made by the Chinese authorities without charges of any sort and the new deeds of ownership shall fully protect the holders of such leases or other documentary evidence and their legal heirs and assigns without diminution of their prior rights and interests, including the right of alienation.

It is further agreed that nationals or the Government of the United States of America shall not be required or asked by the Chinese authorities to make

any payments of fees in connection with land transfers for or with relation to any period prior to the effective date of this treaty.

ARTICLE V

The Government of the United States of America having long accorded rights to nationals of the Republic of China within the territory of the United States of America to travel, reside, and carry on trade throughout the whole extent of that territory, the Government of the Republic of China agrees to accord similar rights to nationals of the United States of America within the territory of the Republic of China. Each of the two Governments will endeavor to have accorded in territory under its jurisdiction to nationals of the other country, in regard to all legal proceedings, and to matters relating to the administration of justice, and to the levying of taxes or requirements in connection therewith, treatment not less favorable than that accorded to its own nationals.

ARTICLE VI

The Government of the United States of America and the Government of the Republic of China mutually agree that the consular officers of each country, duly provided with exequaturs, shall be permitted to reside in such ports, places and cities as may be agreed upon. The consular officers of each country shall have the right to interview, to communicate with, and to advise nationals of their country within their consular districts; they shall be informed immediately whenever nationals of their country are under detention or arrest or in prison or are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be permitted to visit any such nationals; and, in general, the consular officers of each country shall be accorded the rights, privileges, and immunities enjoyed by consular officers under modern international usage.

It is likewise agreed that the nationals of each country, in the territory of the other country, shall have the right at all times to communicate with the consular officers of their country. Communications to their consular officers from nationals of each country who are under detention or arrest or in prison or are awaiting trial in the territory of the other country shall be forwarded to such consular officers by the local authorities.

ARTICLE VII

The Government of the United States of America and the Government of the Republic of China mutually agree that they will enter into negotiations for the conclusion of a comprehensive modern treaty of friendship, commerce, navigation and consular rights, upon the request of either Government or in any case within six months after the cessation of the hostilities in the war against the common enemies in which they are now engaged. The treaty to be thus negotiated will be based upon the principles of international

law and practice as reflected in modern international procedures and in the modern treaties which the Government of the United States of America and the Government of the Republic of China respectively have in recent years concluded with other governments.

Pending the conclusion of a comprehensive treaty of the character referred to in the preceding paragraph, if any questions affecting the rights in territory of the Republic of China of nationals (including corporations or associations), or of the Government, of the United States of America should arise in future and if these questions are not covered by the present treaty, or by the provisions of existing treaties, conventions, or agreements between the Government of the United States of America and the Government of the Republic of China not abrogated by or inconsistent with this treaty, such questions shall be discussed by representatives of the two Governments and shall be decided in accordance with generally accepted principles of international law and with modern international practice.

ARTICLE VIII

The present treaty shall come into force on the day of the exchange of ratifications.

The present treaty shall be ratified, and the ratifications shall be exchanged at Washington as soon as possible.

Signed and sealed in the English and Chinese languages, both equally authentic, in duplicate, at Washington, this eleventh day of January, one thousand nine hundred forty-three, corresponding to the eleventh day of the first month of the thirty-second year of the Republic of China.

CORDELL HULL [SEAL]

WEI TAO-MING [SEAL]

SUPPLEMENTARY EXCHANGE OF NOTES

DEPARTMENT OF STATE,
WASHINGTON, *January 11, 1943*

His Excellency, Dr. WEI TAO-MING,
Ambassador of China

EXCELLENCY:

In connection with the treaty signed today between the Government of the United States of America and the Government of the Republic of China in which the Government of the United States of America relinquishes its extraterritorial and related special rights in China, I have the honor to acknowledge the receipt of your note of today's date reading as follows:

EXCELLENCY: Under instruction of my Government, I have the honor to state that in connection with the treaty signed today by the Government of the Republic of China and the Government of the United States of America, in which the Government of the United States of

America relinquishes its extraterritorial and related special rights in China, it is the understanding of the Government of the Republic of China that the rights of the Government of the United States of America and of its nationals in regard to the systems of treaty ports and of special courts in the International Settlements at Shanghai and Amoy and in regard to the employment of foreign pilots in the ports of the territory of China are also relinquished. In the light of the abolition of treaty ports as such, it is understood that all coastal ports in the territory of the Republic of China which are normally open to American overseas merchant shipping will remain open to such shipping after the coming into effect of the present treaty and the accompanying exchange of notes.

It is mutually agreed that the merchant vessels of each country shall be permitted freely to come to the ports, places, and waters of the other country which are or may be open to overseas merchant shipping, and that the treatment accorded to such vessels in such ports, places, and waters shall be no less favorable than that accorded to national vessels and shall be as favorable as that accorded to the vessels of any third country.

It is mutually understood that the Government of the United States of America relinquishes the special rights which vessels of the United States of America have been accorded with regard to the coasting trade and inland navigation in the waters of the Republic of China and that the Government of the Republic of China is prepared to take over any American properties that may have been engaged for those purposes and to pay adequate compensation therefor. Should either country accord the rights of inland navigation or coasting trade to vessels of any third country such rights would similarly be accorded to the vessels of the other country. The coasting trade and inland navigation of each country are excepted from the requirement of national treatment and are to be regulated according to the laws of each country in relation thereto. It is agreed, however, that vessels of either country shall enjoy within the territory of the other country with respect to the coasting trade and inland navigation treatment as favorable as that accorded to the vessels of any third country.

It is mutually understood that the Government of the United States of America relinquishes the special rights which naval vessels of the United States of America have been accorded in the waters of the Republic of China and that the Government of the Republic of China and the Government of the United States of America shall extend to each other the mutual courtesy of visits by their warships in accordance with international usage and comity.

It is mutually understood that questions which are not covered by the present treaty and exchange of notes and which may affect the sovereignty of the Republic of China shall be discussed by representatives of the two Governments and shall be decided in accordance with generally accepted principles of international law and with modern international practice.

With reference to Article IV of the treaty, the Government of the Republic of China hereby declares that the restriction on the right of alienation of existing rights or titles to real property referred to in that article will be applied by the Chinese authorities in an equitable manner and that if and when the Chinese Government declines to give assent

to a proposed transfer the Chinese Government will, in a spirit of justice and with a view to precluding loss on the part of American nationals whose interests are affected, undertake, if the American party in interest so desires, to take over the right or title in question and to pay adequate compensation therefor.

It is mutually understood that the orders, decrees, judgments, decisions and other acts of the United States Court for China and of the Consular Courts of the United States of America in China shall be considered as *res judicata* and shall, when necessary, be enforced by the Chinese authorities. It is further understood that any cases pending before the United States Court for China and the Consular Courts of the United States of America in China at the time of the coming into effect of this treaty shall, if the plaintiff or petitioner so desires, be remitted to the appropriate courts of the Government of the Republic of China which shall proceed as expeditiously as possible with their disposition and in so doing shall in so far as practicable apply the laws of the United States of America.

It is understood that these agreements and understandings if confirmed by Your Excellency's Government shall be considered as forming an integral part of the treaty signed today and shall be considered as effective upon the date of the entrance into force of that treaty.

I shall be much obliged if Your Excellency will confirm the foregoing.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

I have the honor to confirm that the agreements and understandings which have been reached in connection with the treaty signed today by the Government of the United States of America and the Government of the Republic of China are as set forth in the above note from Your Excellency.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

CORDELL HULL

GREAT BRITAIN-UNITED STATES

AGREEMENT REGARDING PROBLEMS OF MARINE TRANSPORTATION AND LITIGATION¹

Signed at London, December 4, 1942

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland being desirous of defining, in so far as certain problems of marine transportation and litigation are concerned, the manner in which shall be provided mutual aid in the conduct of the war including the aid contemplated by the agreements concluded between them at Washington on the 23rd February, 1942, and the 3rd September, 1942,² have agreed as follows:

¹ Department of State Bulletin, Jan. 9, 1943, Vol. VIII, p. 29.

² *Ibid.*, Feb. 28, 1942, p. 190, and of Sept. 5, 1942, p. 734; this JOURNAL, Supplement, Vol. 36 (1942), pp. 170, 219.

ARTICLE 1

(1) Each contracting Government agrees to waive all claims arising out of or in connection with negligent navigation or general average in respect of any cargo or freight owned by such Government and in respect of any vessel (including naval vessel) owned by such Government against the other contracting Government or any cargo, freight or vessel (including naval vessel) owned by such other Government or against any servant or agent of such other Government or in any case where such other Government represents that such claim if made would ultimately be borne by such other Government.

(2) Each contracting Government agrees on behalf of itself and of any organization which is owned or controlled by it and operating for its account or on its behalf to waive all claims for salvage services against the other contracting Government or against any cargo, freight or vessel (including naval vessel) owned by such other Government or in any case where such other Government represents that such salvage claim if made would ultimately be borne by such other Government.

(3) Each contracting Government agrees to waive all claims for loss of or damage to cargo owned by such Government and arising out of the carriage thereof or for loss of or damage to any cargo or vessel owned by one contracting Government and caused by the shipment or carriage of cargo owned by the other contracting Government against such other Government or against any servant or agent of such other Government or against any vessel (including naval vessel) owned by such other Government or in any case where such other Government represents that the claim if made would ultimately be borne by such other Government.

(4) Each contracting Government undertakes not to make any claim in respect of any vessel or cargo insured by it to which it may be entitled by virtue of any right of subrogation either—

(a) directly against the other contracting Government; or

(b) in any case where such other Government represents that such claim if made would ultimately be borne by such other Government.

(5) Each contracting Government agrees to extend the principles of this agreement to such other maritime claims as may from time to time be agreed between them.

ARTICLE 2

Where in any case claims arise which are not required to be waived by this agreement in addition to or in conjunction with claims which are so required to be waived and it is necessary in any proceedings including proceedings for the limitation of liability that claims be marshalled or for the proper assessment of any salvage or general average that values should be estimated, the provisions of this agreement shall not apply but claims which would other-

wise be required to be waived under this agreement shall be asserted. Any recoveries, however, shall be waived by the Government entitled to such recoveries or at the option of such Government shall be dealt with in such other way as will give effect to the purposes of this agreement.

ARTICLE 3

(1) For the purpose of this agreement the expression "vessel owned by a contracting Government" includes a vessel on bare boat charter to a contracting Government or requisitioned by a contracting Government on bare boat terms or otherwise in the possession of a contracting Government (except to the extent that the risk of loss or liability is borne by some person other than either contracting Government).

(2) In order to carry out the full intention of the provisions of Article 1 of this agreement each contracting Government will so arrange in connection with bare boat charters to it that the owners or persons interested through such owners shall not have or assert any claims of the character specified in Article 1.

ARTICLE 4

Each contracting Government upon the request of the other will provide undertakings for the release of vessels or cargo owned by the other contracting Government from judicial proceedings in courts in the United States of America or in the United Kingdom as the case may be where such release will promote the war effort and the requesting Government so represents, upon compliance with the following conditions:

(a) upon the tender of such request due authority will be conferred by the Government interested in such vessel or cargo upon the law officers of the Government furnishing the undertaking to appear on their behalf and to conduct the defence of such proceedings in so far as such vessel or cargo is concerned, to settle or compromise any such suit, to assert or settle and compromise any claim to which the requesting Government may be entitled in respect of the subject-matter of the suit and to make and receive payments in respect thereof; and

(b) the requesting Government upon tendering such a request will assure the other Government of its full coöperation in making defence to such suit and asserting such claims including the making available of witnesses and evidence and including preparation for trial.

Unless otherwise agreed, each contracting Government will reimburse or account to the other for any payment made or received by the one Government on behalf of the other.

ARTICLE 5

Nothing in this agreement shall be construed as a waiver of the right of

either contracting Government in appropriate cases to assert sovereign immunity.

ARTICLE 6

(1) This agreement, which shall come into force on the date of signature, shall apply in respect of all claims arising before the date of this agreement but remaining unsettled at such date or which may arise during the currency of this agreement.

(2) This agreement shall remain in force until the expiration of six months from the date upon which either of the contracting Governments shall have given notice in writing of their intention to terminate it.

In witness whereof the undersigned, duly authorized to that effect by their respective Governments, have signed the present agreement and have affixed thereto their seals.

Done in London in duplicate, this fourth day of December, 1942.

*Exchange of Notes Between the American Ambassador and the British
Foreign Secretary*

December 4, 1942

SIR:

With reference to Article IV of the agreement signed today between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America relating to certain problems of maritime transportation and litigation, I have the honor to state that for the present and until further notice it is the intention of my Government that the accounting contemplated by that article will be accomplished under the Act of Congress of March 11, 1941, to the extent authorized under that Act.

Accordingly, the Government of the United States will in appropriate cases make such payments as are necessary in the course of operations under the agreement according to its procedure in the administration of that Act and will receive any moneys which may accrue in the course of such operations as a benefit under that Act and Article VI of the agreement between our two Governments dated February 23, 1942.

Accept [etc.]

JOHN G. WINANT.

FOREIGN OFFICE, S.W. 1,
4th December, 1942

YOUR EXCELLENCY,

I have the honor to acknowledge receipt of your note of today's date referring to Article IV of the agreement signed today between our two Governments relating to certain problems of marine transportation and litigation. In reply I wish to state that for the present and until further notice my Government intends that the accounting required by Article IV shall

be on the same basis as the payments contemplated in Your Excellency's note and that the Government of the United Kingdom will make any payments required by the agreement and receive any moneys accruing under it as reciprocal aid according to the terms of the agreement between our two Governments dated the 23rd February, 1942.

I have [etc.]

ANTHONY EDEN

INTER-AMERICAN CONFERENCE OF POLICE AND JUDICIAL AUTHORITIES

FINAL ACT ¹

*Held in the City of Buenos Aires, Capital of the Argentine Republic, from
May 27 to June 9, 1942*

In compliance with the resolutions adopted by the Meetings of the Ministers of Foreign Affairs of the American Republics, the Argentine Government, after consultation with the Pan American Union, invited the Governments of El Salvador, United States of America, Cuba, Chile, Guatemala, Perú, Dominican Republic, Bolivia, Ecuador, Uruguay, Venezuela, Colombia, Brazil, Haiti, Honduras, Panamá, Nicaragua, México, Paraguay and Costa Rica, to the Inter-American Conference of Police and Judicial Authorities to meet at Buenos Aires, the capital of the Argentine Republic, on May 27, 1942.

The invitation extended by the Government of the Argentine Republic was accepted, and the American Republics indicated below appointed the representatives whose names are set forth according to the order established by lot at the Conference.

EL SALVADOR: Santo S. Faré, *Delegate*.

UNITED STATES OF AMERICA: Carl Spaeth, *Delegate*; William Sanders, *Adviser*; Clifton English, *Secretary*.

CUBA: Ramiro Hernández Portela, *Delegate*.

CHILE: Alberto Sepúlveda Contreras, *Delegate*; Horatio Suárez Herreros, *Adviser*; Carlos Videla Lira, *Secretary*.

ARGENTINA: Jorge H. Frías, *Delegate*; Eusebio Gómez, Laureano Landaburu (Jr.), *Advisers*.

PERU: José Jacinto Rada B., *Delegate*; Carlos Ramírez Núñez, *Adviser*; Ricardo Ubillúz Prado, *Secretary*.

DOMINICAN REPUBLIC: Pedro Troncoso Sánchez, *Delegate*.

¹ English version reprinted, with a few minor verbal modifications, from certified copy of the Final Act in *Conferencia Interamericana sobre Coordinación de Medidas Policiales y Judiciales* (Buenos Aires: República Argentina, 1942), pp. 45-77, on file with the Pan American Union, Washington, D. C.

BOLIVIA: Jorge Valdés Musters, *Delegate*; Carlos Johnson, Manuel López-Rey y Arrojo, Jorge Rebollo Urquiza, Víctor Manuel del Castillo, *Advisers*; Gustavo Medeiros Querejazú, *Secretary*.

ECUADOR: Carlos Morales Chacón, *Delegate*.

URUGUAY: Luis A. Bouza, *Delegate*.

VENEZUELA: Eduardo Arroyo Lamedá, *Delegate*.

COLOMBIA: Germán Zea Hernández, *Delegate*.

BRAZIL: Mario de Pimentel Brandão, *Delegate*; Ivens de Araujo, Alfonso Celso de Paula Lima, Plinio Brasil Milano, *Advisers*.

HAITI: José Manuel Alvarez Aránguiz, *Delegate*; Pedro F. Meitín, *Adviser*.

HONDURAS: Arturo Mejía Nieto, *Delegate*; Julián Carlos Duprat, *Adviser*.

PANAMA: Ernesto Méndez, *Delegate*; José de la Cruz Herrera, *Adviser*.

NICARAGUA: Rubén Darío, *Delegate*; Julio González Iramain, José Basualdo, *Advisers*; Benito Ureta Sáenz Peña, *Secretary*.

MÉXICO: Carlos Darío Ojeda, *Delegate*; Carlos Valdéz Armienta, *Adviser*.

PARAGUAY: Dámaso A. Sosa Valdéz, *Delegate*.

The inaugural session of the Conference was held on May 27, 1942, at 11 a.m. In attendance were the Minister for the Interior, and the Minister for Foreign Affairs and Worship of the Argentine Republic, as also the members of the diplomatic corps, officials and guests specially invited.

The Delegate for the Argentine Republic and Provisional President, Dr. Jorge H. Frías, was appointed permanent President of the Conference, Dr. Raúl C. Migone performing the duties of Secretary General.

As a result of the debates held in the preliminary session of May 28, 1942, and in the first plenary session on May 29, 1942, it was decided to appoint the Committees on Credentials and Coördination, in accordance with the Rules and Regulations, a General Committee to classify, centralize and distribute the projects submitted to the Conference, and two subcommittees, entrusted with the study of the matters included in the first and in the second chapters, respectively, of the program of the Conference, each subcommittee to have two rapporteurs.

These committees and subcommittees were formed as follows:

CREDENTIALS

President: Ernesto Méndez (Panamá).

GENERAL COMMITTEE

President: Mario de Pimentel Brandão (Brazil).

Vice President: Ramiro Hernández Portela (Cuba).

Rapporteur: Eusebio Gómez (Argentina).

Rapporteur: Luis Bouza (Uruguay).

FIRST SUBCOMMITTEE

President: Carlos Darío Ojeda (México).

Vice President: Pedro Troncoso Sánchez (Dominican Republic).

Rapporteur: Carl Spaeth (United States of America).

Rapporteur: José Jacinto Rada B. (Perú).

SECOND SUBCOMMITTEE

President: Jorge Valdés Musters (Bolivia).

Vice President: Ernesto Méndez (Panamá).

Rapporteur: Germán Zea Hernández (Colombia).

Rapporteur: Arturo Mejía Nieto (Honduras).

COMMITTEE ON COÖRDINATION

President: Eduardo Arroyo Lameda (Venezuela).

The International Conference for the Coördination of Police and Judicial Authorities, after the deliberations in the committees, and after hearing the reports of the respective rapporteurs, approved the following resolutions and recommendations at the closing session held on June 9, 1942:

I. RESOLUTION RELATIVE TO DISSEMINATION OF PROPAGANDA BY MEANS OF PUBLIC DEMONSTRATIONS

Whereas:

1. It is of vital importance to the American Republics to prevent the diffusion of propaganda directed, supported or instigated by foreign governments, groups or individuals, which tends to endanger their security, their institutions and the democratic ideals which inspire them;

2. Because of their deeply disturbing influence and the dangers they represent, it is imperative to include among the acts of propaganda classified as anti-American in character, all public demonstrations and exhibitions, of any nature whatsoever, which are held within the American Republics under the auspices and in the interest of non-American States which have committed acts of aggression against American Republics; these acts of aggression have brought about the participation of some of the Republics in the war, the condemnation of the aggressor nations by all the Republics, the application, by various means, in the presence of a common danger, of the pacts of continental solidarity, and have hardened the determination of all the American nations to dedicate themselves to the task of taking all necessary measures to safeguard their security and their common heritage of liberty and democracy;

3. As a consequence, the acts of propaganda mentioned above, which are contrary to the principles, traditions and ideals which govern and strengthen the life of the American Republics, must come within the scope of the preventive and repressive action of the police and judicial authorities of the American nations;

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

First: To declare that it is of vital importance for the police and judicial

authorities of America to prevent and repress, during the present war, all public demonstrations and exhibitions, whether spoken, written, broadcast, printed or in images, or by any other means, that are contrary to the spirit of the inter-American pacts of defensive solidarity, and that are favorable to the States which have committed acts of aggression against American Republics, or to the allies of the said States in the Tripartite Pact and States subservient to them.

Second: To recommend to the American Republics which have not yet done so, that they adopt measures to protect this vital interest.

II. RESOLUTION RELATIVE TO PROPAGANDA IN EDUCATIONAL INSTITUTIONS

Whereas:

One of the most dangerous forms of the subversive propaganda referred to in Resolution XVII of the Third Meeting of the Ministers of Foreign Affairs of the American Republics is sometimes undertaken in primary, secondary or university educational institutions and schools which are under the direction or supervision of nationals of members of the Tripartite Pact or of States subservient to them.

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

To recommend to the Governments of the American Republics that they enact legal measures, or carefully revise existing provisions on the subject, to prevent propaganda in primary, secondary or university educational establishments and schools which are directed or supervised by nationals of the members of the Tripartite Pact or States subservient to them; that they close any school in which, by means of lessons, lectures, shows, hymns, images and photographs, special symbols, or any other means of influencing opinion, an effort is made to induce the pupils, whether children or adults, to sympathize with, or take part in, activities or aggressive acts against the democratic institutions of the Continent, or against its integrity and sovereignty; and that the application of the penalty recommended hereinabove shall be without prejudice to the application of other penalties established for the same purposes by the laws of the respective countries, such as expulsion, imprisonment, or fines.

III. RECOMMENDATION RELATIVE TO ASSOCIATIONS

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

That the Governments of the American Republics enact laws regulating the constitution of associations controlled, directly or indirectly, by nationals

of members of the Tripartite Pact or of States subservient to them, or which seek to act in any way on behalf of, or in the political interest of, any non-American State which is not engaged at war on the side of an American Republic, and for the purpose of preventing the formation and existence of entities which conspire openly or secretly against American solidarity or the security, independence or integrity of the American nations.

IV. RESOLUTION RELATIVE TO FISHING VESSELS

Whereas:

1. The unusual frequency with which marauding submarines operate near the coasts of America, at great distances from their natural bases, logically leads to the assumption that supply bases must be available to them near the places where they operate, which places upon the Governments of the American countries the duty to prevent elements connected with the members of the Tripartite Pact, and States subservient to them, from rendering any form of assistance in the supplying of fuel, provisions or ammunition to such submarines;

2. The privileges granted to fishing vessels to put out to sea without a strict supervision by the respective authorities affords such elements an opportunity to give the said submarines assistance of the kind mentioned.

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

First: To declare that supervision over the activities of fishing vessels of every kind, whether they belong to private individuals or to commercial enterprises, and the careful examination of their cargoes at the time of their departure from and upon their arrival at American shores, would contribute to the effectiveness of American police methods during the present war.

Second: To recommend to the Governments of the American Republics that they adopt measures in accordance with the objectives set forth above.

V. RECOMMENDATION ON THE ENFORCEMENT OF LAWS AND REGULATIONS RELATIVE TO SUBVERSIVE ACTIVITIES AND ON THE CREATION OF A SPECIAL POLICE UNIT TO DEAL WITH SUCH ACTIVITIES

Whereas:

1. The Governments of the twenty-one American Republics recognized, at the Third Meeting of the Ministers of Foreign Affairs of the American Republics, that activities of individuals and organizations acting on behalf of and in the interest of the members of the Tripartite Pact and of the States subservient to them, constitute an immediate and grave threat to the individual and collective security and welfare of the American family of nations;

2. The immediate and urgent need in meeting this threat is a more

vigorous enforcement throughout the Hemisphere of existing basic legislation and regulations relative to the control of activities directed against the security of the State and its institutions;

3. That, in the same manner, the constant interchange of information and personal contact between the officials charged in each country with the enforcement and administration of the above-mentioned laws and regulations, especially with respect to the control and suppression of subversive activities which transcend national frontiers in their scope and effects, would be mutually beneficial and would contribute substantially to the success of the measures taken for the effective and energetic fulfillment of existing laws against such activities;

4. That the effective prevention and repression of the above-mentioned activities requires the existence of a competent national entity, which cannot be either the ordinary police or the intelligence services, where these exist, but a special police section or unit trained in the methods of sabotage, apparent accidents in important industries, espionage, and other acts which disturb the political and economic life of the country;

5. That the said unit does not represent a political police organization in the old manner, but a special service with specific functions contributing effectively to the prevention of subversive activities directed against the external or internal security of the State in the political, economic, industrial and commercial fields;

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

First: To recommend to the Governments of the American Republics that they direct their police, military and other appropriate administrative and law-enforcing officials and departments to undertake an immediate intensification of the programs directed to the elimination of subversive elements within the respective national territory which act on behalf of, or in the interest of the members of the Tripartite Pact and of the States subservient to them.

Second: To recommend to the said Governments that they require the above-mentioned officials and departments to submit periodic reports on the measures taken under existing laws and regulations, and under such special laws and regulations as hereafter may be adopted in the light of experience and changing circumstances.

Third: To recommend that the Emergency Advisory Committee for Political Defense consider the desirability of convoking informal inter-American meetings, regional and general in character, of the officials mentioned above, in order that they may discuss problems of common interest in the defense against subversive activities of persons acting in the interest of members of the Tripartite Pact and of States subservient to them.

Fourth: To recommend, in order to insure maximum inter-American coöperation, that the American Governments take immediate measures for the creation, where they do not now exist within the police organization, of a special corps, section or unit, entitled "Political-Social Police" or with an analogous title, entrusted with the special task of preventing and discovering, through the special training of its members, the crimes of espionage, sabotage, treason, and other activities directed against the external or internal security of the State in its political, economic, industrial and commercial aspects.

VI. RECOMMENDATION RELATIVE TO THE STUDY OF A UNIFORM PENAL LAW

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

That, in view of the requirements of the political defense of the American Continent during the existing emergency, the Emergency Advisory Committee for Political Defense formulate and submit to the Governments of the American Republics, a draft uniform penal law relative to the prevention and repression of activities against the integrity, independence, solidarity, unity and defense of the American States.

VII. RECOMMENDATION RELATIVE TO FRAUDULENT CITIZENSHIP

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

That the American Republics enact legislation providing:

That any national of the countries members of the Tripartite Pact or of States subservient to them who fraudulently obtains for himself or for another person, by means of a judicial or administrative procedure conducted at his request, the nationality of the respective American Republic, shall be punished with confinement or imprisonment for from two to five years.

The sentence shall deprive him of the nationality illegally obtained, and also of the public offices obtained by virtue thereof and shall justify his expulsion from the country or, if this is not possible, the exercise of strict vigilance over his movements by the appropriate authorities.

VIII. RESOLUTION CONCERNING THE GRANTING OF CITIZENSHIP

Whereas:

The existing international situation compels the American countries to adopt restrictive measures of a temporary nature relative to the granting of a citizenship in the case of persons who do not have an intention to settle in the country which shelters them;

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

To recommend to the Governments that, within the scope of their respec-

tive laws, they restrict the granting of legal citizenship or naturalization to all aliens who do not produce satisfactory proof of, and demonstrate upon due investigation, their legal right to citizenship, without prejudice to the granting of asylum to political refugees in accordance with national practice and international conventions.

IX. RECOMMENDATION RELATIVE TO THE SOUTH AMERICAN TREATY ON
CRIMINAL LAW OF 1940

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

First: That the Governments of the American Republics which are not signatories of the Treaty on Criminal Law signed at Montevideo on March 19, 1940, study the treaty.

Second: That the Emergency Advisory Committee for Political Defense and the Inter-American Bar Association study the above-mentioned treaty and make known their conclusions to the Governments mentioned in the first paragraph.

X. RECOMMENDATION ON EXTRADITION

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

That the American Republics agree to grant extradition of nationals of members of the Tripartite Pact and of States subservient to them who are indicted or condemned for crimes against American solidarity, or the security, integrity or defense of any American Republic, in accordance with the procedures provided for in their respective laws or in the treaties and international agreements to which they are parties.

XI. RESOLUTION ON THE DRAFT CONVENTION RELATIVE TO THE EXPULSION OF
ALIENS

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

To transmit the Draft Convention Relative to the Expulsion of Aliens, presented by the Argentine Delegation,² to the Emergency Advisory Committee for Political Defense, with the recommendation that the Committee study the draft, taking into account the requirements of the present emergency and the discussions at the present Conference.

XII. RESOLUTION ON SPECIAL TRAVEL DOCUMENTS

Whereas:

1. As a result of the existing international situation, many foreign residents

²Omitted from this Supplement. For the text, see *Conferencia Interamericana sobre Coördinación de Medidas Policiales y Judiciales*, *supra*, p. 78.

in America are without diplomatic representation or consular protection, being unable, as a result, to obtain or renew their respective passports;

2. The laws of some countries recognize the validity of special travel documents;

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

To recommend to the Governments of the American Republics that, in addition to passports and certificates of identity recognized by bilateral agreements as valid travel documents, they recognize special travel documents issued under appropriate guarantees, including a consular visa, which are for "in transit" or for a clearly determined purpose.

XIII. RESOLUTION ON THE DRAFT CONVENTION RELATIVE TO THE CREATION
OF AN INTER-AMERICAN POLICE UNION

Whereas:

1. The Delegations of Argentina, Bolivia and Nicaragua, Honduras and Perú, have respectively submitted the following projects: Inter-American Police Convention; Recommendation for the Adoption of an Inter-American Identification System; Resolution on the Creation of an Inter-American Register of Police and Judicial Documents; Recommendation on the Creation of a Pan-American Police Union;³

2. These projects express a lofty spirit of continental solidarity, and are inspired by the desire to establish coöperation among the police and judicial authorities of the American Republics on well defined and adequate bases;

3. In view of the close relationship existing among the above-mentioned projects, the Special Committee of the present Conference has combined the basic ideas and provisions of these proposals in a single instrument;

4. The said instrument, as well as the original projects, are worthy of careful study by the Governments and the respective national authorities of the American Republics before a definite convention on the subject is signed;

The Inter-American Conference of Police and Judicial Authorities,

Resolves:

First: To transmit to the Pan American Union the draft Convention relative to the creation of an Inter-American Police Union formulated by the Special Committee of the Conference, in order that the Pan American Union may communicate it to the Governments of the American Republics and to the Emergency Advisory Committee for Political Defense, with the request that they present their observations thereon.

³ Omitted from this Supplement. For the texts, see *Conferencia Interamericana*, *ibid.*, pp. 88-123.

Second: To recommend that, in the study of this draft convention, the Governments and the Emergency Advisory Committee consider the original proposals of the Delegations of Argentina, Bolivia and Nicaragua, Honduras and Perú, as well as the discussions which took place regarding them during the present Conference, and which are recorded in its proceedings, copies of which shall be sent to the Pan-American Union by the Secretary General of the Conference in order that they may be sent by the Union to the Governments and to the Committee.

Third: To urge the Pan American Union to prepare the definite project of convention, on the bases of the said draft and of the observations presented by the Governments, members of the Union, and by the above-mentioned Emergency Committee.

Fourth: That the said draft convention be considered at a special conference, or at the next International Conference of American States, or that, after its approval, it be open for signature by the American Republics at the Pan American Union.

XIV. RECOMMENDATION ON THE CREATION OF NATIONAL INTER-DEPARTMENTAL COMMITTEES

The Inter-American Conference of Police and Judicial Authorities,

Recommends:

That the American Governments consider the desirability of establishing, as soon as possible, in their respective countries, an Interdepartmental Coördinating Committee, or adopt an analogous procedure, for facilitating the fulfilment of the recommendations of the present Conference, and for furnishing the national liaison representative with the Emergency Advisory Committee for Political Defense, all the assistance and coöperation which may be necessary to the practical and efficient performance of his duties.

In Testimony whereof, the Delegates have signed this present Final Act, in Spanish, English, French, and Portuguese.

Done in Buenos Aires, the Capital City of the Argentine Republic, on the ninth of June in the year one thousand nine hundred and forty-two.

RESERVATIONS MADE BY THE ARGENTINE DELEGATION

I. Resolution relative to propaganda by means of public demonstrations:

“That the measures recommended in the first article should be enforced in accordance with the fundamental laws of each country.”

II. Resolution relative to propaganda in educational institutions.

III. Recommendation relative to associations.

V. Recommendation on the enforcement of laws and regulations relative

to subversive activities and on the creation of a special police unit to deal with such activities.

VI. Recommendation relative to the study of a uniform penal law:

"That the Emergency Advisory Committee for Political Defense may only formulate a draft convention and not a project law."

VII. Recommendation relative to fraudulent citizenship:

"That the laws and measures mentioned in the preceding resolutions and recommendations should not contain limitations based upon the respective nationalities of the persons to whom they shall be applicable."

RESERVATIONS MADE BY THE CHILEAN DELEGATION

"The Delegation of Chile subscribes to this Final Act of the Conference, renewing the reservations and the observations submitted during the debates in the General Committee and subcommittees, and subject to the subsequent approval of its Government."

El Salvador: SANTO S. FARÉ.

Estados Unidos de América: CARL SPAETH.

Cuba: RAMIRO HERNÁNDEZ PORTELA.

Chile: ALBERTO SEPÚLVEDA CONTRERAS.

Argentina: JORGE H. FRÍAS.

Peru: JOSÉ JACINTO RADA B.

República Dominicana: PEDRO TRONCOSO SÁNCHEZ.

Bolivia: JORGE VALDÉS MUSTERS.

Ecuador: CARLOS MORALES CHACÓN.

Uruguay: LUIS A. BOUZA.

Venezuela: EDUARDO ARROYO LAMEDA.

Colombia: GERMÁN ZEA HERNÁNDEZ.

Brazil: MARIO DE PIMENTEL BRANDAO.

Haiti: JOSÉ MANUEL ALVAREZ ARÁNGUIZ.

Honduras: ARTURO MEJÍA NIETO.

Panamá: ERNESTO MÉNDEZ.

Nicaragua: RUBÉN DARÍO.

México: CARLOS DARÍO OJEDA.

Paraguay: DÁMASO A. SOSA VALDEZ.

LIBERIA-UNITED STATES

DEFENSE AGREEMENT¹

Signed at Monrovia, March 31, 1942

Whereas:

The situation of Liberia is made critical by the existing war and there is danger of attack or aggression by unfriendly Powers; and

¹ Department of State Bulletin, Dec. 5, 1942, Vol. VII, p. 979.

2. Additional protection is necessary in order that the independence and security of the Republic may be safeguarded; and

3. The Government of Liberia has requested that the Government of the United States because of its traditional friendly interest in the welfare of Liberia, give such aid as may be possible in the circumstances in the defense of the Republic; and

4. The Government of Liberia has granted the Government of the United States in this emergency the right to construct, control, operate and defend at the sole cost and expense of the latter and without charge to the Republic of Liberia, such military and commercial airports in the Republic as in consultation with the Government of the Republic of Liberia may mutually be considered necessary; and the right also to assist in the protection and defense of any part of the Republic which might be liable to attack during the present war, said grant to include the right to construct access roads from Monrovia to the airport at Roberts Field on the Farmington River and the seaplane facilities at Fisherman Lake in the County of Grand Cape Mount; and

5. The above mentioned rights have been granted as of February 14, 1942, to become effective from that date and to remain in effect for the duration of the existing war and for a period not to exceed six months thereafter;

THEREFORE, the undersigned to wit:

HARRY A. McBRIDE, Special Representative of the President of the United States of America, acting on behalf of the Government of the United States; and

CLARENCE L. SIMPSON, Secretary of State of the Republic of Liberia, acting on behalf of the Government of Liberia, have agreed as follows:

ARTICLE 1

The grants of rights specified above shall also include the right to improve and deepen channels, to construct connecting roads, communication services, fortifications, repair and storage facilities and housing for personnel, and generally the right to do any and all things necessary to insure the efficient operation, maintenance and protection of such defense facilities as may be established.

ARTICLE 2

The Republic of Liberia retains sovereignty over all such airports, fortifications and other defense areas as may be established under the rights above granted. The Government of the United States during the life of this agreement shall have exclusive jurisdiction over any such airports and defense areas in Liberia and over the military and civilian personnel of the Government of the United States and their families within the airports, fortifications and other defense areas, as well as over all other persons within such areas except Liberian citizens.

It is understood, however, that the Government of the United States may turn over to the Liberian authorities for trial and punishment any person committing an offense in such defense areas. And the Liberian authorities will turn over to the United States authorities for trial and punishment any of the United States military or civilian personnel and their families who may commit offenses outside such defense areas. The Liberian authorities and the United States authorities will take adequate measures to insure the prosecution and punishment in cases of conviction of all such offenders, it being understood that the relevant evidence shall be furnished reciprocally to the two authorities.

ARTICLE 3

It is agreed that the Government of the United States shall have the right to establish and maintain postal facilities and commissary stores to be used solely by the military and civilian personnel of the United States Government and their families stationed in Liberia in connection with this Agreement and with such aid in the defense of Liberia as the Government of the United States may furnish.

ARTICLE 4

All materials, supplies and equipment for the construction, use and operation of said airports of the United States Government and for the personal needs of the military and civilian personnel and their families, shall be permitted entry into Liberia free of customs duties, exise taxes, or any other charges, and the said personnel and their families shall also be exempt from all forms of taxes, assessments and other levies by the Liberian Government and authorities, including exemption from Liberian regulations pertaining to passports, visas and residence permits.

The Government of the United States undertakes to respect all legitimate interests of Liberia and of Liberian citizens, as well as all the laws, regulations and customs relating to the native population and the internal administration of Liberia. In exercising the rights derived from this agreement, the Government of the United States undertakes to give sympathetic consideration to all representations made by the Liberian authorities with respect to the welfare of the inhabitants of Liberia.

In respect of the commercial use of such airports, passengers, mail and cargo entering or leaving Liberia by air shall have transit over such airports to and from a Liberian customs station established adjacent to said airports and under the exclusive jurisdiction of the Government of Liberia.

ARTICLE 5

The Government of the United States undertakes to extend to the Government of Liberia such aid as may be possible in the circumstances in the protection of the Republic, including necessary equipment for road construc-

tion, certain monetary aids for defense purposes, certain assistance in the organization and training of the Liberian military forces and certain other assistance of a similar nature.

ARTICLE 6

The Government of the United States undertakes, at the end of the war and the additional period provided in Paragraph 5 of the preamble to this agreement, to withdraw all military forces of the United States. It is mutually understood and agreed that the jurisdiction hereby conferred on the Government of the United States over any airports and defense areas, and over military and civilian personnel under the provisions of Article 2 of this agreement, shall continue until all matters calling for judicial determination, but undisposed of after the termination of this agreement, shall have been disposed of by the United States authorities, or, alternately, until the withdrawal of the United States forces shall be complete.

ARTICLE 7

The Government of Liberia and the Government of the United States agree that at this time the above agreement shall apply to the air facilities at Roberts Field on the Farmington River, and at Fisherman Lake in the County of Grand Cape Mount. If other defense areas of this kind are deemed necessary in the future, their location will be fixed by mutual agreement.

ARTICLE 8

For the purposes of this agreement, a Defense Area shall be construed as the actual areas of said airports and such additional areas in the immediate neighborhood upon which installations necessary for defense may be established by agreement between the United States commanding officer and the Liberian Government.

Signed, at Monrovia, Liberia, in duplicate, the texts having equal force, this 31st day of March, 1942.

HARRY A. McBRIDE

Special Representative of the President of the United States of America

C. L. SIMPSON

Secretary of State of the Republic of Liberia

MEXICO-UNITED STATES

EXCHANGE OF NOTES REGARDING MILITARY SERVICE OF NATIONALS¹*January 22, 1943**The American Chargé in Mexico, D. F., to the Mexican Foreign Minister*

EXCELLENCY:

I have the honor to refer to Your Excellency's note of January 22, 1943, concerning an agreement between the Governments of Mexico and the United States of America relating to military service of the nationals of either country residing in the other country, which reads textually, in translation, as follows:

I. The nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of the country of their residence on the same conditions as the nationals thereof unless otherwise provided herein.

II. Nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence. In the selection and induction into their armed forces of nationals of the other country the authorities of the respective countries shall take into account on the same basis as if their own nationals were involved the physical condition and health of the individuals concerned, their civil status, their financial dependents, regardless of the place of residence, and any other circumstances which under the laws and regulations in force in the country of residence would apply in selecting and inducting nationals of the latter country.

III. Nationals of either country in the territory of the other country for purposes of study and with the intention of returning to the country of which they are nationals upon the termination of such study shall upon establishing such facts in accordance with existing selective service laws and regulations be relieved from the obligation of military service.

IV. Nationals of either country who under the immigration laws of the other country are technical residents of that country known as "border crossers" shall for military service purposes be considered residents of the country in which they actually live.

V. Officials and employees of either country residing in the other whose official status has been notified to the Government of the country in which they are residing and accepted by that Government shall not be considered for military service purposes as residents of the country in which they are residing.

VI. Each Government in so far as necessities imposed by the war effort permit will furnish the other Government with information concerning its nationals who have registered for or been inducted into the military service.

VII. Nationals of either country serving in the armed forces of the other

¹ Department of State Bulletin, Jan. 23, 1943, Vol. VIII, p. 88.

country shall receive the same treatment and have equal opportunities with respect to commissions, promotions and other incidents of military service as are accorded by that country in conformity with military law and practice to its nationals.

VIII. Representatives of either Government shall have the right to assist their nationals serving in the military forces of the other in all matters relating to their welfare including, but not limited to, the payment of pensions, gratuities, indemnities or other benefits to them or their dependents wherever the latter may be resident.

IX. Nationals of each country who have been registered for or inducted into the army of the other country, in accordance with the military service laws of the latter, and who have not declared their intention to acquire the citizenship of the country in which they reside, shall, upon being designated by the country of which they are nationals, and with their consent, be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired.

X. The understandings in the foregoing arrangement shall be in effect as of today for the duration of the present war and six months thereafter.

The above text has been submitted to my Government and has been found entirely acceptable. It is the belief of the United States Government that this agreement adds further testimony to the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving the victory.

Accept [etc.],

HERBERT S. BURSLEY
Chargé

UNITED STATES

AN ACT

TO FACILITATE THE DISPOSITION OF PRIZES CAPTURED BY THE UNITED STATES
DURING THE PRESENT WAR, AND FOR OTHER PURPOSES¹

[Approved August 18, 1942.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the district courts shall have original jurisdiction of all prizes captured during the present war on the high seas if said capture was made by authority of the United States or was adopted and ratified by the President of the United States and the prize was brought into the territorial waters of a cobelligerent or was faken or ap-

¹ Public Law 704, 77th Cong., Chap. 553, 2 Sess. [H. R. 7211.]

propriated for the use of the United States on the high seas or in such territorial waters, including jurisdiction of all proceedings for the condemnation of such property taken as prize.

Sec. 2. The venue of any proceeding brought under the jurisdiction conferred by this Act shall be in the judicial district selected by the Attorney General, or his designee, for the convenience of the United States.

Sec. 3. The jurisdiction of prizes brought into the territorial waters of a cobelligerent shall not be exercised under authority of this Act, nor shall prizes be taken or appropriated within such territorial waters for the use of the United States, unless the government having jurisdiction over such territorial waters consents to the exercise of such jurisdiction or to such taking or appropriation.

Sec. 4. In any case, whether or not brought under the jurisdiction conferred by this Act, the power to take or appropriate property for the use of the United States as provided by Sections 4624 and 4625 of the Revised Statutes (Title 34, U. S. C., Secs. 1140, 1141) may be exercised by the War Shipping Administration with the approval of the Secretary of the Navy or his designee, or by such other officers or agencies as the President may designate.

Sec. 5. The district courts are authorized to appoint special prize commissioners to exercise abroad in cases arising under this Act the duties prescribed for such commissioners. Said courts may appoint such number of such special commissioners, and having such qualifications, as said courts may deem proper, without regard for the requirements of Section 4621 of the Revised Statutes, as amended (U. S. C., Title 34, Sec. 1137), except that for each case arising under the jurisdiction conferred by this Act there shall be at least one special commissioner who shall be a naval officer, active or retired, approved by the Secretary of the Navy, who shall receive no other compensation than his pay in the Navy, and who shall protect the interests of the Department of the Navy in the prize property. Said courts may confer on such special commissioners such additional powers and duties, to be performed abroad or in the United States, as they may deem necessary or proper for carrying out the purposes of this Act.

Sec. 6. The district courts may adopt such rules to govern the exercise of the jurisdiction conferred by this Act as they may deem necessary or proper for carrying out the purposes thereof. All provisions of law relating to capture as prize or to the taking or appropriation of captures for the use of the United States, to the extent that such provisions are consistent with the provisions of this Act, shall be applicable in the exercise of the jurisdiction herein conferred.

SEC. 7. A cobelligerent of the United States which consents to the exercise of the jurisdiction herein conferred with respect to prizes of the United States brought into its territorial waters and to the taking or appropriation of such prizes within its territorial waters for the use of the United States shall

be accorded, upon proclamation by the President of the United States, like privileges with respect to prizes captured under authority of such cobelligerent and brought into the territorial waters of the United States or taken or appropriated in the territorial waters of the United States for the use of such cobelligerent. Reciprocal recognition and full faith and credit shall be given to the jurisdiction acquired by courts of a cobelligerent hereunder and to all proceedings had or judgments rendered in exercise of such jurisdiction.

SEC. 8. Nothing in this Act shall be construed to impair or diminish the jurisdiction of any court of the United States under any other provisions of law, but the provisions of this Act shall be in addition thereto.

PROCLAMATION

CONCERNING CAPTURE OF PRIZES ON THE HIGH SEAS¹

No. 2575 — January 30, 1943

WHEREAS the Act of August 18, 1942, Public Law 704, 77th Congress, contains in part the following provisions:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the district courts shall have original jurisdiction of all prizes captured during the present war on the high seas if said capture was made by authority of the United States or was adopted and ratified by the President of the United States and the prize was brought into the territorial waters of a cobelligerent or was taken or appropriated for the use of the United States on the high seas or in such territorial waters, including jurisdiction of all proceedings for the condemnation of such property taken as prize.

SEC. 3. The jurisdiction of prizes brought into the territorial waters of a cobelligerent shall not be exercised under authority of this Act, nor shall prizes be taken or appropriated within such territorial waters for the use of the United States, unless the government having jurisdiction over such territorial waters consents to the exercise of such jurisdiction or to such taking or appropriation.

SEC. 7. A cobelligerent of the United States which consents to the exercise of the jurisdiction herein conferred with respect to prizes of the United States brought into its territorial waters and to the taking or appropriation of such prizes within its territorial waters for the use of the United States shall be accorded, upon proclamation by the President of the United States, like privileges with respect to prizes captured under authority of such cobelligerent and brought into the territorial waters of the United States or taken or appropriated in the territorial waters of the United States for the use of such cobelligerent. Reciprocal recognition and full faith and credit shall be given to the jurisdiction acquired by courts of a cobelligerent hereunder and to all proceedings had or judgments rendered in exercise of such jurisdiction.

WHEREAS the Government of the United Kingdom, a cobelligerent, has consented to the exercise of the jurisdiction conferred by the said Act with respect to prizes of the United States brought into the territorial waters of the United Kingdom and Sierra Leone and to the taking or appropriation of

¹ Department of State Bulletin, Feb. 6, 1943, Vol. VIII, p. 133.

such prizes within the territorial waters of the United Kingdom and Sierra Leone for the use of the United States:

Now, therefore, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said Act of August 18, 1942, do proclaim that the Government of the United Kingdom shall be accorded like privileges with respect to prizes captured under authority of the said Government and brought into the territorial waters of the United States or taken or appropriated in the territorial waters of the United States for the use of the said Government.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 30th day of January in the year of our Lord nineteen hundred and forty-three and of the Independence of the United States of America the one hundred and sixty-seventh.

FRANKLIN D. ROOSEVELT

By the President

CORDELL HULL

Secretary of State

NEUTRALITY ACT OF 1939

JOINT RESOLUTION AMENDING SECTION 7¹

Approved February 21, 1942

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 7 of the Neutrality Act of 1939 (Public Resolution Numbered 54, Seventy-sixth Congress)² is amended by adding at the end thereof the following new paragraph:

“(e) This section shall not be operative when the United States is at war.”

¹ Public Law 459, 77th Cong., Chap. 104, 2d Sess.

² This JOURNAL, Supplement, Vol. 34 (1940), p. 49.

TREATIES ON PRIVATE INTERNATIONAL LAW

Signed at the Second South American Congress on Private International Law, Montevideo, 1939-1940, with treaties of the first congress held at Montevideo, 1888-1889, which have not been revised*

INTRODUCTION

By J. IRIZARRY Y PUENTE, *of the New York Bar*

With full grasp of the significance of the labors that the *Congreso Sudamericano de Jurisconsultos*, which met in Lima in 1877-78, was about to undertake, Rospigliosi, the Foreign Minister of Peru, greeted the delegates with the statement that they were assembling "to formulate the Tables of the American New Decalogue."¹ While the work of that Congress was disappointing to Latin Americans generally, because of its manifest subservience to European legal theories, the phrase of Rospigliosi could quite suitably be applied to the labors of the *Congreso Sudamericano de Derecho Internacional Privado*, which met at Montevideo in 1888-89.

Opinion in Latin America concerning the work of this Congress has always been high. The official view is that the treaties there elaborated "were extremely influential as an expression of the juridical science of the time,"² and that their effective importance and excellence in application, have been thoroughly demonstrated.³ Without a doubt, they constitute a definite landmark in the development of the Latin American conception of private international law. As one recent commentator has said:⁴

What *Wittenberg—1517* means to the independent evolution of Lutheran doctrine and confession, *Montevideo—1889* means to the independent evolution of juridical science in South America, *monumentum aere perennius*, to use a celebrated phrase of the great Horace, a monument which marked the opening of new paths in the New World.

ANTECEDENTS

The first official attempt, feeble and rudimentary though it was, to lay down certain principles of private international law, was made in the *Continental Treaty* of 1856, negotiated by Peru, Chile, and Ecuador,⁵ and covered

*Translated from the Spanish by J. Irizarry y Puente, 521 Fifth Ave., New York, and Gwladys L. Williams, 700 Jackson Place, Washington, D. C.

¹ *1 Congresos Americanos de Lima, Recopilación de Documentos precedida de prólogo por Alberto Ulloa*, Lima, 1938, II *Archivo diplomático peruano*, 161.

² *Segundo Congreso Sudamericano de Derecho Internacional Privado, de Montevideo, Ministerio de Relaciones Exteriores y Culto de la República Argentina*, Buenos Aires, 1940, p. 5.

³ *Actas y Tratados del Congreso Sud-Americano de Derecho Internacional Privado, Montevideo 1888-1889, compilación de Ernesto Restelli*, Buenos Aires, 1928, p. 5.

⁴ Prof. Roberto Reich, Montevideo 1889-1939, Tomo VI, No. 21, *Revista de la Universidad de San Francisco Xavier, Sucre (Bolivia)*, 583.

⁵ *1 Congresos Americanos de Lima*, 613-620.

such questions as the recognition and enforcement of foreign judgments,⁶ the exercise of the liberal professions,⁷ extradition,⁸ and piracy.⁹ Indeed, Latin America's awareness of its need for some sort of continental legislative unity could be traced even to earlier years.¹⁰ But it was not until 1877-78 that the call went out to the governments of Latin America to meet for the avowed purpose of framing a code of rules on private international law. On December 11, 1875, the Government of Peru took the initiative in inviting them to Lima "to harmonize their legislation as far as possible."¹¹ Representatives of Argentina, Chile, Bolivia, Ecuador, Venezuela, Costa Rica and Cuba attended. They agreed on certain basic principles, such as the condition and capacity of persons, property and contracts (Tit. I), marriage (Tit. II), inheritance (Tit. III), competency of national courts with respect to juridical acts (Tit. IV), jurisdiction over crimes (Tit. V), execution of foreign judgments (Tit. VI), legalizations (Tit. VII), and certain provisions common to these titles (Tit. VIII),—principles which were incorporated in the *Tratados para establecer reglas uniformes en materia de Derecho Internacional Privado*.¹² Although the Treaty of 1877-78 was never ratified, except by Peru,¹³ chiefly because of the general opposition it aroused in connection with the European thesis of *legal personalism*, which it adopted,¹⁴ the treaty unquestionably is of great historical importance as the work of the first official gathering to undertake the codification of private international law.¹⁵

The concern felt in Latin America over the acceptance of that European thesis at Lima resulted in the calling of the first *Congreso Sudamericano de Derecho Internacional Privado*, celebrated at Montevideo, in the years 1888-89.

PURPOSE OF THE ORIGINAL MONTEVIDEO CONGRESS

The main purpose of this Congress was "to standardize by means of a treaty, the various matters embraced in private international law."¹⁶ The invitation addressed by the Foreign Ministers of Argentina and Uruguay to the Governments of Chile, Brazil, Peru, Bolivia, Ecuador, Colombia, Venezuela and Paraguay,¹⁷ pointed out existing differences in the legislation of the various South American countries within that branch of law, and the

⁶ Art. V.

⁷ Art. VIII.

⁸ Art. VI.

⁹ Art. XVII.

¹⁰ 1 *Congresos Americanos*, 301-333.

¹¹ 2 *Ibid.*, 119.

¹² 2 *Ibid.*, 343-52.

¹³ Alvarado, *Apuntes de Derecho Internacional*, Lima, 1940, Sec. II, "El Sistema de Derecho Internacional Privado adaptado por el Artículo V del Código Civil," p. 51.

¹⁴ Art. 2; 2 *Congresos Americanos*, 311, 344; Alvarado, *op. cit.*, 51; Rodrigo Octavio, *A Codificação do Direito Internacional Privado*, Rio de Janeiro, 1910, p. 88.

¹⁵ Rodrigo Octavio, *op. cit.*, 89.

¹⁶ Protocol of Ministers for Foreign Affairs of Argentina and Uruguay, February 14, 1888, in *Actas y Tratados*, 18-19.

¹⁷ *Ibid.*, 21-23.

hardships which those differences entailed for their nationals. The invitation reads in part as follows:¹⁸

The difference in legislation which causes the difficulties, is the result of the exercise of sovereignty, responding to the peculiar exigencies of each State. Although it is easy to understand that while those differences may be abated, they will not disappear, howsoever enlightened the efforts made to that end, it is nevertheless the duty of governments to struggle for the realization, as far as possible, of unity among the diverse legislations which are the origin of the conflict, by establishing, in every case of diversity, the single international law destined to resolve the difficulty.

Colombia, Ecuador and Venezuela, although they were in sympathy with the purpose of the meeting, did not attend. The accomplishments of the Congress were singularly striking. The treaties which were concluded, covered: International Civil Law, International Commercial Law, International Penal Law, International Procedural Law, Literary and Artistic Property, Trade-Marks, Patents of Invention, Exercise of Liberal Professions, and an Additional Protocol.

The treaties were ratified in their entirety by Peru and Paraguay (1889), Uruguay (1892), Argentina (1894), and Bolivia (1903). In addition, the following adhesions have been tendered:¹⁹

Brazil (1890, Liberal Professions);

Colombia (1917, Literary and Artistic Property; 1920, Procedural Law; 1934, Civil Law, and Commercial Law);

France (1896, Literary and Artistic Property);

Italy (1900, Literary and Artistic Property);

Belgium (1903, Literary and Artistic Property);

Austria (1923, Literary and Artistic Property);

Germany (1925, Literary and Artistic Property);

Hungary (1931, Literary and Artistic Property).

SECOND MONTEVIDEO CONGRESS

(1939, 1940)

In 1939, after a lapse of fifty years, the Governments of Argentina and Uruguay called a second meeting at Montevideo, for July of that year. On August 4, the States represented—Argentina, Uruguay, Peru, Bolivia, Chile, and Paraguay—signed treaties on the following subjects:²⁰ Political Asylum

¹⁸ Protocol of Ministers for Foreign Affairs of Argentina and Uruguay, February 14, 1888, in *Actas y Tratados*, 22.

¹⁹ *Ibid.*, 933-61, 969-1008; Gabriel Giraldo Jaramillo, *Los Tratados de Montevideo de 1940*, Bogotá, 1941, p. 21; Kraiselburd, *Los Tratados de Montevideo y el Derecho Internacional Privado*, 13.

²⁰ *Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo*, 58-77, 81-98, 101-109.

and Refuge, Intellectual Property, and Exercise of the Liberal Professions.

But the 1939 meeting saw that it was desirable, not merely to commemorate the Congress of 1888-1889, but also to hold a new Congress, officially known as the *Segundo Congreso Sudamericano de Derecho Internacional Privado*, for the revision and, if necessary, the amplification of American doctrine in such a way as to include new concepts in the sphere of private international law.²¹ This second meeting took place in March, 1940, and was attended also by Brazil and Colombia. The results of the 1940 meeting, are treaties on:²² International Civil Law, International Commercial Terrestrial Law, International Commercial Navigation Law, International Penal Law, International Procedural Law, and an Additional Protocol.

The revisions of 1939-40 left the Treaties on Trade-Marks and Patents of Inventions of 1888-89 as they were. The Treaty of 1939 on Political Asylum and Refuge, is an expanded exposition of Title II—"Concerning Asylum," Articles 15-18, of the Treaty on International Penal Law of 1888-89. The Treaties of 1940 on International Commercial Navigation Law and International Commercial Terrestrial Law constitute a division and amplification of the Treaty on International Commercial Law of 1888-89.

CONCLUSION

The treaties of the Congresses of 1888-89 and 1939-40, some think, betray a "regional political tendency," which has resulted in their being called "the System of the Plata."²³ Be that as it may, the truth is that those congresses have defined, for most of Latin America, at least, the origin and direction of private international law.²⁴ While the countries of the Old World clung tenaciously to the theory of *legal personalism*, which influenced considerably the juridical thought of that period, and which definitely triumphed in the Lima Treaty of 1877,²⁵ the governments of Latin America were not disposed to accede to the juristic principles laid down in the Lima treaty, since those principles were harmful to their sovereignty, would seriously disturb family ties as well as the relations between aliens and nationals, would hamper the jurisdictional competency of the local tribunals, and threatened to obstruct the growth of an American conception of nationality.²⁶ Instead, the Congresses of 1888-89 and 1939-40 adopted integrally

²¹ José Luis Bustamante y Rivero, "*El Tratado de Derecho Civil Internacional de 1940*," 2 *Revista Peruana de Derecho Internacional*, No. 4 (1942), 230, 231.

²² *Segundo Congreso Sudamericano*, 143-211, 215-284, 287-355, 359-418, 421-448, 451-454.

²³ Bustamante y Rivero, *op. cit.*, 233.

²⁴ Kraiselburd, *op. cit.*, 14.

²⁵ Art. 2. *The conditions and juridical capacity of persons shall be determined by their national law, even when acts executed or property located in another country are concerned.*" 2 *Congresos Americanos*, 344.

²⁶ Baez, *Curso de Derecho Internacional Privado Americano*, Asunción, 1926, p. 28.

and without qualification, the principle of *territoriality*,²⁷ in civil,²⁸ criminal,²⁹ and procedural³⁰ matters.

One of the many excellent features of these treaties is the demotion of the foreign State to the position of a juristic person in private law, with the corresponding responsibilities,³¹ especially in regard to cases where such States employ vessels in carrying on ordinary commercial transactions.³²

TREATY ON POLITICAL ASYLUM AND REFUGE *

Signed at Montevideo, August 4, 1939

His Excellency the President of the Republic of Peru; His Excellency the President of the Argentine Republic; His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Republic of Paraguay, and His Excellency the President of the Republic of Chile.

In view of the fact that the principles governing asylum which were established by the Treaty on International Penal Law signed at Montevideo on January 23, 1889, require amplification in order that they may cover the new situations which have arisen and may serve to confirm the doctrines already sanctioned in America, have agreed to conclude the present Treaty on Political Asylum and Refuge through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose, His Excellency the President of the Republic of Peru has designated as his representatives:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. LUIS ALVARADO GARRIDO.

His Excellency the President of the Argentine Republic has designated as his representatives:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,
Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,

²⁷ Reich, *op. cit.*, 583-84. Peru, which ratified the Treaty of 1877, switched to the principle of *territoriality* when it ratified the treaties of 1889. Alvarado, *op. cit.*, 51.

²⁸ Art. 56, *Tratado de Derecho Civil Internacional*.

²⁹ Art. 1, *Tratado de Derecho Penal Internacional*.

³⁰ Art. 1, *Tratado de Derecho Procesal Internacional*.

³¹ Art. 3, *Tratado de Derecho Civil Internacional*.

³² Arts. 34-42, Title X. "*De los buques de Estado*," *Tratado de Derecho de Navegación Comercial Internacional*.

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 11-16.

Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS.

His Excellency the President of the Republic of Bolivia has designated as his representatives:

Dr. RUBEN TERRAZAS, and
Dr. JORGE VALDES MUSTERS.

His Excellency the President of the Republic of Paraguay has designated as his representatives:

Dr. LUIS DE GASPERI,
Dr. LUIS A. ARGANA, and
Dr. RAUL SAPENA PASTOR.

His Excellency the President of the Republic of Chile has designated as his representatives:

Dr. JOAQUIN FERNANDEZ Y FERNANDEZ, and
Dr. JULIO ESCUDERO GUZMAN.

The aforesaid representatives, having presented their full powers, which were found to be in due form, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

Chapter I. On Political Asylum

ARTICLE 1. Asylum may be granted without distinction of nationality, and without prejudice to the rights and obligations of protection appertaining to the State to which the refugees belong.

The State which grants asylum does not thereby incur an obligation to admit the refugees into its territory, except in cases where they are not given admission by other States.

ARTICLE 2. Asylum may be granted only in embassies, legations, men-of-war, military camps or military airplanes, and exclusively to persons pursued for political reasons or offenses, or under circumstances involving concurrent political offenses, which do not legally permit of extradition. The chiefs of mission may also receive refugees in their residences, in cases where the former do not live on the premises of the embassies or legations.

ARTICLE 3. Asylum shall not be granted to persons accused of political offenses, who shall have been indicted or condemned previously for common offenses, by the ordinary tribunals.

The determination of the causes which induce the asylum appertains to the State which grants it.

Asylum may not be granted to deserters from the sea-, land-, or air forces, except when the act is clearly of a political character.

ARTICLE 4. The diplomatic agent or military commander who grants asylum shall immediately communicate the names of the refugees to the Ministry for Foreign Affairs of the State where the act in question occurred, or to the administrative authorities of the locality, if the said act has taken place outside the seat of government, except when grave circumstances materially impede such communication or make it dangerous to the safety of the refugees.

ARTICLE 5. While the asylum continues, the refugees shall not be permitted to commit acts which may disturb the public tranquillity or may tend toward participation in, or influence upon, political activities. The diplomatic agents or military commanders shall require of the refugees information as to their personal history, and a promise not to enter into external communications without the express intervention of the former. This promise shall be in writing and signed; and if the refugees should refuse to accept, or should violate, any of these conditions, the diplomatic agent or commander shall immediately terminate the asylum. The refugees may be forbidden to carry with them articles other than those destined for personal use, the papers which belong to them, and the money necessary for their living expenses, the deposit of any other securities or articles in the place of asylum being prohibited.

ARTICLE 6. The Government of the State may demand that a given refugee be removed from the national territory within the shortest possible time; and the diplomatic agent or military commander who has granted the asylum may, for his part, demand the necessary guaranties before the refugee is permitted to leave the country, with due regard for the inviolability of the latter's person, and of the papers belonging to him and carried with him at the time when he received asylum, as well as for the funds necessary to support him for a reasonable time. In the absence of such guaranties, the departure may be postponed until the local authorities shall make them available.

ARTICLE 7. Once they have left the State, the refugees shall not be landed in any other part of it. In case an ex-refugee should return to the country in question, he shall not be accorded new asylum if the disturbance which led to the original grant subsists.

ARTICLE 8. When the number of refugees exceeds the normal capacity of the places of refuge specified in Article 2, the diplomatic agents or military commanders may provide other places, under the protection of their flag,

for the safety and lodging of the said refugees. In such cases, the agents or commanders must communicate that fact to the authorities.

ARTICLE 9. Men-of-war or military airplanes temporarily located in dry-docks or workshops for repairs, shall not accord protection to persons who take refuge in them.

ARTICLE 10. If, in a case of severance of relations, the diplomatic representative who has granted asylum should have to leave the territory of the country where he is located, he shall depart from it accompanied by the refugees; or, if this should be impossible for some reason not dependent upon the choice of the refugees or of the diplomatic agent, he may deliver them to the agent of a third State, with the guaranties specified in this treaty. Such delivery shall be effected by the transfer of the said refugees to the premises of the diplomatic mission which shall have accepted the charge in question, or by leaving the refugees on the premises where the archives of the departing diplomatic mission are kept; and these premises shall remain under the direct protection of the diplomatic agent to whom that function has been intrusted. In either case, the local Ministry for Foreign Affairs shall be duly advised, in conformity with the provisions of Article 4.

Chapter II. On Asylum in Foreign Territory

ARTICLE 11. Asylum granted within the territory of the high contracting parties, in conformity with the present treaty, is an inviolable asylum for persons pursued under the conditions described in Article 2; but it is the duty of the State to prevent the refugees from committing within its territory, acts which may endanger the public peace of the State from which they come.

The determination of the causes that induce the asylum appertains to the State which grants it.

The grant of asylum does not entail for the State which makes that grant, any obligation to admit the refugees indefinitely into its territory.

ARTICLE 12. Political emigrants shall not be permitted to establish *juntas* or committees for the purpose of instigating or promoting disturbances of order in any of the contracting States. Such *juntas* or committees shall be disbanded, upon proof of their subversive character, by the authorities of the State where they are found to exist.

Discontinuance of the benefits of asylum does not imply authorization to place a refugee in the territory of the pursuing State.

ARTICLE 13. Upon the request of the interested State, the one which has granted asylum shall undertake to keep watch over or to intern political emigrants, within a reasonable distance from its frontiers. The State receiving the request shall determine the propriety of the petition and shall fix the distance in question.

ARTICLE 14. The State making the request shall be liable for all expenses incurred in the internment of political refugees and emigrants.

Prior to the internment of the refugees, the States involved shall come to an agreement concerning their maintenance.

ARTICLE 15. Political internees shall advise the Government of the State where they are located, when they decide to leave its territory. Their departure shall be permitted on condition that they do not go to the country of their origin, and notice of this permission shall be given to the interested State.

Chapter III. General Provisions

ARTICLE 16. Any difference which may arise concerning the application of this treaty shall be decided through diplomatic channels, or, in default thereof, shall be submitted to arbitration or judicial decision, provided that there is a tribunal whose jurisdiction both parties recognize.

ARTICLE 17. Any State which has not signed the present treaty may adhere to it by sending its instrument of adhesion to the Ministry for Foreign Affairs of the Oriental Republic of Uruguay, which shall notify the other high contracting parties, through diplomatic channels, of that adhesion.

ARTICLE 18. This treaty shall be ratified by the high contracting parties in accordance with their constitutional rules. The original treaty and the instruments of ratification shall be deposited with the Ministry for Foreign Affairs of the Oriental Republic of Uruguay, which shall communicate the ratifications, through diplomatic channels, to the other contracting States. The treaty shall go into effect among the high contracting parties in the order in which they have deposited their ratifications. The corresponding notification shall be considered as an exchange of ratifications.

ARTICLE 19. This treaty shall remain in force indefinitely, but may be denounced through notice given two years in advance, after the lapse of which period it shall cease to bind the denouncing State, but shall continue to be binding upon the other signatory States. Denunciations must be addressed to the Ministry for Foreign Affairs of the Oriental Republic of Uruguay, which shall transmit them to the other contracting States.

In Witness Whereof, the above-mentioned Plenipotentiaries sign the present treaty in the City of Montevideo, on the 4th day of August, 1939.

TREATY ON INTELLECTUAL PROPERTY *

Signed at Montevideo, August 4, 1939

His Excellency the President of the Republic of Peru; His Excellency the President of the Argentine Republic; His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 17-21.

of Bolivia, and His Excellency the President of the Republic of Paraguay, have agreed to conclude a Treaty on Intellectual Property, through the medium of their plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic, the respective representatives being:

For His Excellency the President of the Republic of Peru:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. LUIS ALVARADO GARRIDO.

For His Excellency the President of the Argentine Republic:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,
Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,
Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

For His Excellency the President of the Oriental Republic of Uruguay:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS.

For His Excellency the President of the Republic of Bolivia:

Dr. RUBEN TERRAZAS, and
Dr. JORGE VALDES MUSTERS.

For His Excellency the President of the Republic of Paraguay:

Dr. LUIS DE GASPERI,
Dr. LUIS A. ARGANA, and
Dr. RAUL SAPENA PASTOR.

The aforesaid representatives, having presented their full powers, which were found to be in due form; having taken into consideration the fact that the Treaty on Literary and Artistic Property signed in Montevideo on January 11, 1889, might well be subjected to a process of revision for the purpose of adapting it to the new circumstances prevailing in regard to this matter, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

ARTICLE 1. The signatory States agree to recognize and to ensure the rights of intellectual property and the exercise thereof, in conformity with the provisions of the present treaty.

ARTICLE 2. It is hereby declared that the said provisions apply to the

authors of all works which involve intellectual creation and are susceptible of being published or reproduced by any process, and in particular: to authors of books, pamphlets, and writings of all kinds, whatsoever their distribution and scope; of public lectures, school or university lectures, speeches, addresses, sermons, and oratorical pieces in general; of musical compositions (with or without words), dramatic, musicodramatic, choreographic and pantomimic works, and simple pageants, whenever it is possible to individualize such works in writing or graphically; of original creations intended to be projected through the cinematograph and the corresponding musical accompaniments; of works in the fields of engineering, drawing, painting, sculpture, architectural composition, engraving, lithography, photography, and comparable arts; of graphic and plastic illustrations prepared for scientific, technical or artistic purposes; or of cartographic, schematic and statistical works.

ARTICLE 3. The authors' rights to which the foregoing article refers, include the power to dispose of one's own works, to publish, transfer, translate and adapt them, or to authorize their translation and adaptation, as well as their orchestration, execution, reproduction and diffusion by means of cinematography, photography, telephotography, phonography, radio-telephony, or any other technical means.

ARTICLE 4. Translations, adaptations, musical arrangements, and every other transformed reproduction of literary or artistic works (such as cinematographic versions thereof), as well as compilations of various works, shall be considered for the purposes of this treaty as original productions, without prejudice to the rights which, in each case, the authors of the primary works or the lawful successors of those authors, may invoke.

ARTICLE 5. Persons who publish, translate, adapt, arrange, reproduce or disseminate, by any process, productions in connection with which the rights guaranteed by this treaty do not exist or have expired, shall enjoy with respect to their own work the rights proclaimed in Article 3; but they may not forbid the making of new editions, translations, adaptations, arrangements, and reproductions, or renewed dissemination of the said productions.

ARTICLE 6. Authors whose rights are protected in accordance with the laws in force in any of the States which have adhered to the treaty, except in so far as concerns rights whose protection depends upon treaties concluded by that State with other States which have not adhered, shall enjoy in all of the other States, those same rights and guaranties accorded them, respectively, by the said laws; and the legal organisms of the adhering States should create among themselves the coördination necessary to supply one another directly with the information and security pertinent to the establishment of such claims, at the expense of the persons interested. The entities created legally for the purpose of protecting authorship rights, provided that they are adequately authorized by the interested parties, shall be competent to carry on their respective lawsuits, in the other States, but shall con-

form in so doing to the laws of the country where the proceedings take place.

ARTICLE 7. No State shall be bound to recognize a right of literary or artistic property for a longer time than the period applying to authors who secure such rights in that State itself. The time may be limited to that fixed in the country of origin, if the latter period is shorter.

ARTICLE 8. Newspaper articles may be reproduced, provided that mention is made of the source.

ARTICLE 9. Speeches delivered or read in deliberative assemblies, before courts of justice, or in public gatherings, may be published in newspapers, without need for any authorization.

ARTICLE 10. Indirect and unauthorized appropriations of a literary or artistic work, which do not themselves have the character of an original work and which are designated by various terms, are considered unlawful reproductions.

ARTICLE 11. The rights of authorship shall be recognized, except upon proof to the contrary, in favor of the persons whose names or pseudonyms appear on the literary or artistic works in question.

If the authors choose to withhold their names, the publishers should expressly state that the rights of authorship belong to them.

ARTICLE 12. The liabilities incurred by persons who usurp the rights upheld in this treaty shall be determined by the tribunals and laws of the State where the unlawful act has been committed; or, in the event that it has been perpetrated in a non-adhering State, by the tribunals and laws of the State in whose territory the effects of the act shall be felt.

ARTICLE 13. Any unlawful reproduction of a work whose author is entitled to legal protection may be seized by the competent authorities of any adhering State.

ARTICLE 14. The recognition of the right of property in regard to literary or artistic works does not deprive the signatory States of the power to forbid, in accordance with their laws, the reproduction, publication, dissemination, representation or exhibition of works considered inimical to morality or to good habits of conduct.

ARTICLE 15. Independently of the ownership rights protected by this treaty, authors retain the power to assert their claim to authorship of their works, as well as to oppose any defacement, mutilation, or other modification thereof which they may consider injurious to their honor or reputation.

This right may be exercised by the legal successors of an author, in accordance with the domestic laws of the respective adhering States.

ARTICLE 16. The simultaneous ratification of this treaty by all of the signatory States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 17. When the exchange has been made in the form indicated by the preceding article, this treaty shall be effective from that time forth indefinitely; and the treaty signed in Montevideo on the 11th day of January, 1889, shall accordingly be without force.

ARTICLE 18. If any of the signatory nations should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 19. Article 16 applies also to countries which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid nations sign the present treaty, in Montevideo, on the 4th day of August, 1939.

CONVENTION ON THE EXERCISE OF LIBERAL PROFESSIONS *

Signed at Montevideo, August 4, 1939

His Excellency the President of the Republic of Peru; His Excellency the President of the Argentine Republic; His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of Bolivia, and His Excellency the President of the Republic of Paraguay, have agreed to conclude a Convention on the Exercise of Liberal Professions, through the medium of their plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic, the respective representatives being:

For His Excellency the President of the Republic of Peru:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and

Dr. LUIS ALVARADO GARRIDO.

For His Excellency the President of the Argentine Republic:

Dr. JUAN ALVAREZ,

Dr. DIMAS GONZALEZ GOWLAND,

Dr. CARLOS M. VICO,

Dr. RICARDO MARCO DEL PONT,

Dr. CARLOS ALBERTO ALCORTA, and

Dr. JUAN AGUSTIN MOYANO.

For His Excellency the President of the Oriental Republic of Uruguay:

Dr. JOSE IRURETA GOYENA,

Dr. PEDRO MANINI RIOS,

Dr. JUAN JOSE DE AMEZAGA,

Dr. JOSE PEDRO VARELA, and

Dr. ALVARO VARGAS.

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 22-24.

For His Excellency the President of the Republic of Bolivia:

Dr. RUBEN TERRAZAS, and

Dr. JORGE VALDES MUSTERS.

For His Excellency the President of the Republic of Paraguay:

Dr. LUIS DE GASPERI,

Dr. LUIS A. ARGANA, and

Dr. RAUL SAPENA PASTOR.

The aforesaid representatives, having presented their full powers, which were found to be in due form, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

ARTICLE 1. Nationals and aliens who in any of the States signatory to this convention shall have obtained degrees or diplomas for the exercise of liberal professions, issued by the competent national authority, shall be considered qualified to exercise those professions in the other States, provided that the said degrees or diplomas represent studies and practical work which are reasonably equivalent to the work required, during the same period, of local students in the university to which application is made for confirmation of validity; and also provided that the applicants satisfy the general requisites laid down for the exercise of the respective professions. If necessary, the said applicants may take an examination on the subjects needed to complete the equivalence of their status.

ARTICLE 2. The requirements for equivalent status shall be regarded as completely satisfied when the holder of the diploma shows that he has held a university professorship for ten years in any of the subjects pertaining to the profession in question.

ARTICLE 3. In order that the degree or diploma mentioned in the foregoing articles may have the effects indicated, the following requisites are imposed:

(a) Exhibition of the same, duly legalized;

(b) Proof by the individual exhibiting it that he is the person in whose name it was issued.

ARTICLE 4. The simultaneous ratification of this convention by all of the signatory States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 5. When the exchange has been made in the form indicated by the preceding article, this convention shall be effective from that time forth indefinitely; and the treaty signed in Montevideo on the 4th day of February, 1889, shall accordingly be without force.

ARTICLE 6. If any of the signatory nations should deem it advisable to withdraw its adherence to the convention or introduce changes into the said

instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 7. Article 4 applies also to countries which have not attended this assembly of juriconsults, but which wish to adhere to the present convention.

In Witness Whereof, the plenipotentiaries of the aforesaid nations affix their signatures hereto, in Montevideo, on the 4th day of August, 1939.

TREATY ON INTERNATIONAL COMMERCIAL NAVIGATION LAW *

Signed at Montevideo, March 19, 1940

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of the United States of Brazil; His Excellency the President of the Republic of Colombia; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Chile; His Excellency the President of the Republic of Peru, and His Excellency the President of the Republic of Paraguay,

In the belief that the principles governing maritime law, which were confirmed by the Treaty on International Commercial Law signed at Montevideo on February 12, 1889, should be amplified in such a manner as to embrace the new concepts that have been accepted in regard to that matter,

Have agreed to conclude the present treaty through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose,

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS GUILLEMETTE.

His Excellency the President of the United States of Brazil has designated:

Dr. SEBASTIAN DO REGO BARROS,
Dr. HAHNEMANN GUIMARAES,
Dr. PEDRO BAPTISTA MARTINS,

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 31-40.

Dr. MARIO BULHOES PEDREIRA, and
Dr. ALEXANDRE MARCONDES MACHADO, Jr.

His Excellency the President of the Republic of Colombia has designated:

Dr. ROBERTO URDANETA AUBELAEZ, and
Dr. RAIMUNDO RIVAS.

His Excellency the President of the Republic of Bolivia has designated:

Dr. JORGE VALDES MUSTERS,
Dr. FEDERICO GUTIERREZ GRANIER, and
Dr. GUILLERMO FRANCOVICH.

His Excellency the President of the Argentine Republic has designated:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,
Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,
Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Republic of Chile has designated:

Dr. JOAQUIN FERNANDEZ Y FERNANDEZ, and
Dr. JULIO ESCUDERO GUZMAN.

His Excellency the President of the Republic of Peru has designated:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. JOSE JACINTO RADA.

His Excellency the President of the Republic of Paraguay has designated:

Dr. RAUL SAPENA PASTOR, and
Dr. EMILIO SAGUIER ACEVAL.

The said representatives, having presented their full powers, which were found to be in due form, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

Title I. Of Vessels

ARTICLE 1. The nationality of vessels is determined and regulated by the law of the State which permitted the use of its flag. Proof of this nationality is afforded in the appropriate certificate, lawfully issued by the competent authorities of the said State.

ARTICLE 2. The law of the State which gives its nationality to the vessel governs everything relative to the acquisition and transfer of ownership thereof, to liens and other real rights, or to publicity measures whose object is to ensure that interested third parties shall have knowledge of these matters.

ARTICLE 3. In so far as liens and other real rights are concerned, a change of nationality does not affect existing rights to the vessel. The duration of such rights is regulated by the law of the flag legitimately flown by the vessel at the time when the change of nationality was effected.

ARTICLE 4. The right to attach and sell a vessel by judicial procedure is regulated by the law of its location.

Title II. Of Collisions

ARTICLE 5. Collisions come under the law of the State in whose waters they occur, and are subject to the jurisdiction of its tribunals.

ARTICLE 6. If the collision occurs outside of territorial waters, between vessels of the same nationality, the law of the State whose flag they fly shall be applicable, and the tribunals of that State shall have jurisdiction to try the civil and criminal causes arising from the collision.

ARTICLE 7. If the collision occurs outside of territorial waters, between vessels of different nationalities, each vessel shall be bound by the terms of the law corresponding to its flag, and may not recover more than the said law allows.

ARTICLE 8. In the cases covered by the foregoing article, the civil actions must be filed, according to the preference of the libellant:

- (a) Before the judges or tribunals of the libelee's domicile;
- (b) Before those of the vessel's port of register;
- (c) Or before those having jurisdiction in the place where the vessel was attached by reason of the collision, or where it makes its first call, or where it chances to put into port.

ARTICLE 9. In these same cases, the shipmaster and other persons serving on the vessel cannot be prosecuted criminally or in disciplinary proceedings, except before the judges or tribunals of the State whose flag the vessel was flying at the time of the collision.

ARTICLE 10. Every creditor of the owner or outfitter of the vessel whose claims as creditor are based upon the collision, may obtain the judicial attachment or arrest of that vessel, even though it be on the point of departure.

This right may be exercised by nationals or by aliens domiciled in any one of the contracting States, with respect to vessels of the nationality of any of the said States, when the vessels are within the jurisdiction of the tribunals of the said State of domicile.

Proceedings relative to the attachment, release from attachment, or judicial arrest of the vessels, and matters incidental thereto, are subject to the law of the judge or tribunal who ordered such measures.

ARTICLE 11. The foregoing provisions relative to collisions between vessels, apply also to collisions between a vessel and any moveable or immovable property, as well as to indemnity for damages caused in consequence of the passage or navigation of one vessel in the vicinity of another, even when no physical contact has occurred.

Title III. Of Assistance and Salvage

ARTICLE 12. Services of assistance or salvage rendered within the jurisdictional waters of one of the States shall be governed by the national law of the State in question.

If such services are rendered outside of territorial waters, they shall be governed by the law of the State whose flag is flown by the assisting or salvaging vessel.

ARTICLE 13. Questions which may arise concerning services of assistance or salvage shall be decided:

1. In the case of services rendered within territorial waters, by the judges or tribunals of the place where such services were rendered;

2. In the case of those rendered outside of territorial waters, according to the choice of the libellant:

- (a) Before the judges or tribunals of the libelee's domicile;

- (b) Before those corresponding to the register of the vessel assisted;

- (c) Or, before those who exercise jurisdiction in the place where the vessel assisted makes its first call, or chances to put into port.

ARTICLE 14. The foregoing provisions apply to services of assistance or salvage rendered by vessels and airplanes at sea, or conversely. They apply also to services rendered to such vessels or planes, by persons on shore or by means of floating structures.

Title IV. Of Average

ARTICLE 15. The law corresponding to the nationality of the vessel determines the character of the average.

ARTICLE 16. Particular average relative to the vessel is governed by the law of the latter's nationality; that relative to the merchandise shipped, by the law applicable to the contract of charter-party or transport.

The judges or tribunals of the port of discharge, or, in default thereof, those of the port where the discharge should have been made, are competent to try the respective libels.

ARTICLE 17. General average is governed by the law in force within the State in whose port its settlement and distribution is made.

All matters relative to the conditions and formalities of the act of general average are excepted, and remain subject to the law of the nationality of the vessel.

ARTICLE 18. The settlement and distribution of the general average shall be made in the port of destination of the vessel, or, if the vessel fails to reach that destination, in the port where the discharge is made.

ARTICLE 19. The judges or tribunals of the State in whose port the settlement and distribution are effected, are competent to try actions for general average; and any stipulation conferring jurisdiction on the judges or tribunals of another State is void.

Title V. Of the Shipmaster and Personnel on Board Ship

ARTICLE 20. Contracts of employment are governed by the law corresponding to the nationality of the vessel on which the officers and members of the crew serve.

ARTICLE 21. Everything concerning the internal order of the vessel, and the rights and obligations of the shipmaster, officers and members of the crew, is governed by the laws of the State of the vessel's nationality.

ARTICLE 22. The local authorities of a port of one of the States, do not have jurisdiction in regard to the discipline and maintenance of internal order on a vessel located in the waters of that port but having the nationality of one of the other States. An exception is made to this rule when the security or public order of the port where the vessel is located, has been or tends to be disturbed, or when the intervention of the said local authorities is requested by the shipmaster or the appropriate consul.

ARTICLE 23. Civil controversies relating to the discharge of their duties which may arise between the shipmaster and crew members in service on a vessel of the nationality of any of the States, while that vessel is in the territorial waters of another State, are outside the jurisdiction of the local authorities. Such controversies must be decided by the authorities of the State whose flag the vessel flies, according to the laws and regulations of the said State.

ARTICLE 24. Civil controversies between the shipmaster or the crew members of a vessel having the nationality of one of the States, and persons who are not in the permanent employ of that vessel, occurring while the disputants are within the territorial waters of another State, shall be subject to the law of the latter, and be decided by the local judges or tribunals.

Title VI. Of Charter-Parties and Transport of Merchandise or Persons

ARTICLE 25. Contracts of charter-party, and of transport of merchandise or persons, concerned with effecting such transportation between ports of one and the same State, are governed by the laws of that State, regardless of nationality of the vessel involved. Cognizance of actions which may arise falls under the jurisdiction of the judges or tribunals of the said State.

ARTICLE 26. When the contracts above-mentioned are to be executed in one of the States, they are governed by the law in force in that State, regardless of the place where they were concluded or the nationality of the vessel. The phrase "place of execution" refers to the port where the merchandise is unloaded or the persons are disembarked.

ARTICLE 27. In the cases specified in Article 26, the judges or tribunals of the place of execution, or, at the option of complainant, those of the defendant's domicile, shall be competent to try the respective actions; and any stipulation providing otherwise shall be null.

Title VII. Of Insurance

ARTICLE 28. Contracts of insurance are governed by the laws of the State where the insurance company or its branches or agencies are domiciled; and in cases involving branches or agencies they shall be regarded as having their domicile in the place where they operate.

ARTICLE 29. Insurance which covers enemy property is valid even when the contract is made by the enemy, except when that contract relates to contraband of war. Payment of indemnities must be postponed until the conclusion of peace.

ARTICLE 30. The judges or tribunals of the State where the insurance company is domiciled, or, in the case of branches and agencies, the corresponding judges or tribunals, are competent to try actions based upon the contract of insurance.

When insurance companies, or their branches or agencies, are plaintiffs, they may sue before the judges or tribunals of the place where the insured party is domiciled.

Title VIII. Of Hypothecations

ARTICLE 31. Hypothecations on, or any other real right of guaranty over, vessels of the nationality of one of the States, regularly executed and recorded according to the laws thereof, shall be valid and enforceable in the other States.

Title IX. Of Bottomry Loans

ARTICLE 32. Contracts of bottomry are governed by the law of the State in which the particular loan is made.

ARTICLE 33. Questions which may arise between the lender and the borrower shall be subject to the jurisdiction of the judges or tribunals of the defendant, or to those of the place where the contract was concluded.

Title X. Of Vessels belonging to the State

ARTICLE 34. Vessels which are the property of the contracting States or operated by them, the freight and passengers carried by such vessels, and the cargoes which belong to the States, in so far as concerns claims relative to the operation of the vessels or the transport of passengers and freight, are subject to the laws and rules of responsibility and competency applicable to private vessels, cargo and equipment.

ARTICLE 35. The rule laid down in the preceding article does not apply to men-of-war, yachts, airplanes, or hospital-, coast guard-, police-, sanitation-, supply-, and public-works vessels; nor to other vessels which are the property of the State, or operated by it, and which are employed, at the time when the claim arises, in some public service outside the field of commerce.

ARTICLE 36. In the actions or claims to which the preceding article re-

fers, the owner-, or outfitter-State cannot avail itself of its special immunities if the case comes under one of the following heads:

1. Actions arising from collisions or other accidents of navigation;
2. Actions arising from services of assistance or salvage, or relating to general average;
3. Actions based upon repairs, supplies, or contracts on other matters relative to the vessel.

ARTICLE 37. The vessels to which Article 35 refers cannot in any case be the object of attachment, or of any other judicial proceeding, not authorized by the law of the owner- or outfitter-State.

ARTICLE 38. The same rules apply to freight belonging to a given State and transported in any of the vessels mentioned in Article 35.

ARTICLE 39. Freight which belongs to a given State, and which is transported on board commercial vessels in the performance of public services outside the field of commerce, cannot be the object of attachment or arrest or any judicial proceeding.

However, actions based on collision or other accidents of navigation, assistance, salvage, or general average, and likewise actions arising out of contracts relative to the freight, may be brought in conformity with Article 36.

ARTICLE 40. In every case of doubt as to the character of a public service unrelated to the commercial rôle of the vessel or its freight, the attestation of the State, signed by its diplomatic representative, shall constitute full proof for the purposes of release from attachment or arrest.

ARTICLE 41. The privilege of immunity from attachment cannot be invoked for acts performed during the employment of a vessel of the State in a public service outside the field of commerce, if at the time when the judicial proceeding is undertaken, the ownership of the vessel, or its operation, has been transferred to private third parties.

ARTICLE 42. Vessels of a State which are assigned to commercial service, and private vessels engaged in postal service, cannot be attached by their creditors at the ports of call where they are obliged to perform the services in question.

Title XI. General Provisions

ARTICLE 43. The provisions of this treaty shall apply likewise to fluvial, lacustrine, and air navigation.

ARTICLE 44. The simultaneous ratification of this treaty by all of the contracting States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 45. When the exchange has been made, in conformity with the preceding article, this treaty shall be effective from that time forth indefi-

nately; and the treaty signed in Montevideo on February 12, 1839, shall accordingly be without force.

ARTICLE 46. If any of the contracting States should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 47. Article 44 applies also to States which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid States sign the present treaty, in Montevideo, the 19th day of March, 1940.

Reservation

By the Delegation of Boliva:

The Delegation of Bolivia subscribes to the present treaty in so far as it refers to fluvial, lacustrine and air navigation.

TREATY OF INTERNATIONAL PROCEDURAL LAW *

Signed at Montevideo, March 19, 1940

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of the United States of Brazil; His Excellency the President of the Republic of Colombia; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Peru, and His Excellency the President of the Republic of Paraguay,

Have agreed to conclude the present treaty through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose,

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS GUILLEMETTE.

His Excellency the President of the United States of Brazil has designated:

Dr. SEBASTIAN DO REGO BARROS,
Dr. HAHNEMANN GUIMARAES,
Dr. PEDRO BAPTISTA MARTINS,

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 41-48.

Dr. MARIO BULHOES PEDREIRA, and

Dr. ALEXANDRE MARCONDES MACHADO, Jr.

His Excellency the President of the Republic of Colombia has designated:

Dr. ROBERTO URDANETA ARBELAEZ, and

Dr. RAIMUNDO RIVAS.

His Excellency the President of the Republic of Bolivia has designated:

Dr. JORGE VALDES MUSTERS,

Dr. FEDERICO GUTIERREZ GRANIER, and

Dr. GUILLERMO FRANCOVICH.

His Excellency the President of the Argentina Republic has designated:

Dr. JUAN ALVAREZ,

Dr. DIMAS GONZALEZ GOWLAND,

Dr. CARLOS M. VICO,

Dr. RICARDO MARCO DEL PONT,

Dr. CARLOS ALBERTO ALCORTA, and

Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Republic of Peru has designated:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and

Dr. JOSE JACINTO RADA.

His Excellency the President of the Republic of Paraguay has designated:

Dr. RAUL SAPENA PASTOR, and

Dr. EMILIO SAGUIER ACEVAL.

The said representatives, having presented their full powers, which were found to be in due form; having taken into consideration the fact that the Treaty on International Procedural Law signed at Montevideo on January 11, 1889, might well be subjected to a process of revision for the purpose of modifying and harmonizing the rules therein laid down, and bearing in mind the conference and discussions held in this connection, have agreed upon the following provisions:

Title I. General Principles

ARTICLE 1. Trials and their incidents, of whatsoever nature, shall be conducted in accordance with the procedural law of the State in which the trials are held.

ARTICLE 2. Proofs shall be admitted and weighed according to the law applicable to the juridical act which forms the subject-matter of the proceedings. Those proofs are excluded which, by their character, are not authorized by the law of the place where the trial is held.

Title II. Of Legalization

ARTICLE 3. Sentences and homologated awards rendered [in a signatory State] in regard to civil, commercial or contentious-administrative matters,

public indentures and other documents executed by functionaries of a [signatory] State, and letters requisitorial or rogatory [therein issued], are considered authentic in the other signatory States, in accordance with this treaty, provided that they are duly legalized.

ARTICLE 4. The legalization shall be considered as executed in due form when it is carried out in accordance with the laws of the country from which the document in question issues, and when that document has been authenticated by the diplomatic or consular agent accredited to the said country by the Government of the State in whose territory the execution is requested.

Title III. Of the Enforcement of Letters Requisitorial, Judgments, and Arbitral Awards

ARTICLE 5. Judgments and arbitral awards rendered in civil and commercial matters in one of the signatory States shall have in the territory of the other signatories, the same force as in the country where they were pronounced, provided that they comply with the following requirements:

(a) They must have been rendered by a tribunal competent in the international sphere;

(b) They must have a final character, or the authority of *res judicata*, in the State where they were rendered;

(c) The party against whom they were pronounced must have been legally summoned, and either represented or declared in default, in conformity with the law of the country in which the trial was held;

(d) They must not conflict with public order in the country of their enforcement.

Civil judgments rendered in any signatory State by an international tribunal, and relating to private persons or interests, are included under the provisions of this article.

ARTICLE 6. The documents indispensable in order to request enforcement of a judgment or arbitral award, are the following:

(a) A complete copy of the judgment or arbitral award;

(b) A copy of the documents necessary to show that paragraph (c) of the preceding article has been complied with;

(c) An authenticated copy of the order which declares that the judgment or award in question is final, or has the authority of *res judicata*, together with an authenticated copy of the laws upon which that order is based.

ARTICLE 7. The execution of the aforesaid judgments and arbitral awards, including the judgments of international tribunals mentioned in the last paragraph of Article 5, must be requested of the competent judges or tribunals, who, upon hearing the State's Attorney, and after receiving proof that those judgments or awards meet the requirements of the said article, shall order enforcement through the proper channels, in conformity with the corresponding provisions of the local law of procedure.

In any case, upon request of the State's Attorney, or even independently

of such a request, the party against whom enforcement is sought for the judgment or arbitral award in question, may be heard, without taking any other measures of defence.

ARTICLE 8. The judge from whom the enforcement of a foreign sentence is requested, acting upon petition of one of the parties or even *ex officio*, without entering into additional proceedings, may take all the measures which are necessary to ensure the effectiveness of that sentence, conformably with the provisions of the law of the local tribunal regarding sequestrations, inhibitions, attachments or other preventive measures.

ARTICLE 9. When the case calls solely for the establishment of the fact that a given judgment or award has the authority of *res judicata*, such judgment or award should be offered in judicial proceedings, supported by the documents to which Article 6 refers, at the proper time and in accordance with the local law; and the judges or tribunals shall pass upon the merit thereof in the sentence which they pronounce, after ascertaining in a hearing of the State's Attorney that the requisites laid down in Article 5 have been met.

ARTICLE 10. Procedural acts of a non-contentious nature, such as inventories, the reading of wills, appraisals, and the like, which have been carried out in one State, shall have in the others the same force as if they had taken place in the territory of the latter, provided that they meet all of the requirements set forth in the preceding articles.

ARTICLE 11. Letters requisitorial and letters rogatory, which have as their object the issuance of notices, the taking of depositions, or the execution of any other judicial measure, shall be complied with in the signatory States, provided that the said letters meet the requirements laid down in this treaty. Likewise, such letters must be prepared in the language of the State which issues them, and must be accompanied by a duly certified translation in the language of the State to which they are addressed. Rogatory commissions in civil or criminal matters, transmitted through the diplomatic agents—or, in their absence, the consular agents—of the country which issues the letter, will not require legalization of signature.

ARTICLE 12. When the letter requisitorial or letter rogatory refers to attachments, appraisals, inventories or any preventive measure, the judge to whom it is addressed shall make the necessary provisions for the appointment of experts, appraisers, receivers, and in general, for everything conducive to the better discharge of the commission involved.

ARTICLE 13. Letters requisitorial or rogatory shall be acted upon according to the laws of the country which is asked to execute them. If they relate to attachment, the propriety of that measure shall be governed and determined by the laws and the judges of the place where the proceedings are held.

The process and form of attachment, and the exemption from attachment of the property designated with that end in view, shall be governed by the

laws and ordered by the judges of the place where the said property is located.

In order to execute the judgment rendered in the proceedings in which it was ordered that property located in another territory be attached, the procedure indicated in Articles 7 and 8 of this treaty shall be followed.

ARTICLE 14. When attachment proceedings have been instituted, the person affected by this measure may allege before the judge to whom the letter requisitorial was addressed, the pertinent third-party claim, with the sole purpose of having that claim communicated to the judge of origin. When the latter has been notified of the interposition of the third-party claim, he shall suspend the principal proceedings for a term not to exceed sixty days so that the third-party claimant may assert his rights. The third-party claim shall be examined by the judge of the principal proceedings, in conformity with the laws of his locality. Any third-party claimant who appears before the court after the expiration of the sixty-day term must accept the existing status of the case.

If the third-party claim urged is based upon ownership or upon real rights over the property attached, it shall be passed upon by the judges in accordance with the laws of the country where the said property is located.

ARTICLE 15. Persons interested in the execution of letters requisitorial and letters rogatory may appoint agents, shall be responsible for expenses incurred in the exercise of the agents' powers or in the resultant proceedings.

Title IV. Of Civil Meetings of Creditors

ARTICLE 16. Civil meetings of creditors are governed and conducted in accordance with the laws, and before the judges, of the country where the debtor has his domicile.

ARTICLE 17. In cases involving property located in one or more signatory States, other than property in the debtor's domicile, the creditors may institute independent proceedings in each of the said States.

ARTICLE 18. When the insolvency has been declared, and without prejudice to the right established in Article 17, each judge shall take the pertinent preventive steps with respect to the property located in other countries, and, in so doing, shall proceed according to the forms established for such cases in the preceding articles.

ARTICLE 19. When the preventive measures have been complied with, the judges to whom the letters requisitorial were addressed shall publish proclamations, throughout a thirty-day period, announcing the insolvency hearing, the appointment of the receiver and his domicile, the time-limit for submitting the evidence of claims, and the preventive measures which may have been taken.

ARTICLE 20. In the cases mentioned in Article 17, the local creditors, within a period of sixty days immediately after the last publication provided for in Article 19, may ask for insolvency proceedings against the debtor, with

respect to property located in their own country. In these instances, just as in cases involving a single insolvency hearing which is held before the tribunals and according to the laws of the country of the debtor's domicile, the local creditors shall have preferential rights in regard to property located in the territory where their claims should be met.

ARTICLE 21. When several insolvency hearings are in order, any surplus which may be left over in favor of the debtor of one signatory State, shall be held to await the outcome of the other hearings, and shall preferably be handed over, through judicial channels, for the purposes of the hearing first announced.

ARTICLE 22. Liens are determined exclusively by the law of the State where each proceeding is opened, subject to the following limitations:

(a) The special lien on immovables and the real right of mortgage, shall be subject to the law of the State where the property is located;

(b) The special lien on moveables is subject to the law of the State where those moveables are located, without prejudice to the rights of the State in regard to taxes due.

The same rule prevails with respect to rights based on possession or tenancy of moveable property, or on public registry, or on any other form of publicity.

ARTICLE 23. The authority of the receivers, or of the legal representatives of the creditors, shall be recognized in all of the States; and these shall permit in their territory the exercise of the functions allowed the said receivers and representatives by the insolvency law and by the present treaty.

ARTICLE 24. Incapacity affecting the debtor shall be decreed by the judge of his domicile, according to the law thereof. Incapacity relative to property located in other countries may be declared by the local tribunals in accordance with their own laws.

The rehabilitation of the insolvent party and the effects thereof shall be governed by the same rules.

ARTICLE 25. The rules relative to insolvency proceedings shall likewise be applicable to the judicial liquidations, precautionary agreements, suspensions of payment and other analogous measures which may be provided for in the laws of the contracting States.

General Provisions

ARTICLE 26. The simultaneous ratification of this treaty by all of the signatory States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 27. When the exchange has been made in the form indicated by the preceding article, this treaty shall be effective from that time forth in-

definitely, among the States which shall have complied with the said formality; and the treaty signed in Montevideo on the 11th day of January, 1889, shall accordingly be without force.

ARTICLE 28. If any of the signatory States should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 29. Article 26 applies also to States which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid States sign the present treaty, in Montevideo, on the 19th day of March, 1940.

Reservations

1. By the Delegation of the United States of Brazil:

(a) *As to Article 2*—The Delegation understands that the weighing of the proof must be governed by the *lex fori*.

(b) *As to Article 5*—It understands that the provisions of Articles 776 and 778 of the Brazilian Code of Procedure are excepted from the effects of Article 5.

2. By the Delegation of the Argentine Republic:

(c) *As to Article 11*—The Delegation understands that when a request for issuance of letters requisitorial is opposed, before the judge to whom the request is made, by pleas based upon pendency of action or upon incompetence of jurisdiction but which nevertheless attribute cognizance of the case to tribunals of the State to which the said judge belongs, the latter, in defense of his own jurisdiction, may refuse absolutely or in part to carry out the request.

TREATY ON INTERNATIONAL PENAL LAW *

Signed at Montevideo, March 19, 1940

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of the United States of Brazil; His Excellency the President of the Republic of Colombia; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Peru, and His Excellency the President of the Republic of Paraguay,

Have agreed to conclude the present treaty through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose,

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 49-60.

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS GUILLEMETTE.

His Excellency the President of the United States of Brazil has designated:

Dr. SEBASTIAN DO REGO BARROS,
Dr. HAHNEMANN GUIMARES,
Dr. PEDRO BAPTISTA MARTINS,
Dr. MARIO BULHOES PEDREIRA, and
Dr. ALEXANDRE MARCONDES MACHADO, Jr.

His Excellency the President of the Republic of Colombia has designated:

Dr. ROBERTO URDANETA ARBELAEZ, and
Dr. RAIMUNDO RIVAS.

His Excellency the President of the Republic of Bolivia has designated:

Dr. JORGE VALDES MUSTERS,
Dr. FEDERICO GUTIERREZ GRANIER, and
Dr. GUILLERMO FRANCOVICH.

His Excellency the President of the Argentine Republic has designated:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,
Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,
Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Republic of Peru has designated:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. JOSE JACINTO RADA.

His Excellency the President of the Republic of Paraguay has designated:

Dr. RAUL SAPENA PASTOR, and
Dr. EMILIO SAGUIER ACEVAL.

The said representatives, having presented their full powers, which were found to be in due form, having taken into consideration the fact that the Treaty on International Penal Law signed at Montevideo on January 23, 1889, might well be subjected to a process of revision for the purpose of modifying and harmonizing the rules therein laid down, and bearing in

mind the conferences and discussions held in this connection, have agreed upon the following provisions:

Title I. Of Jurisdiction and the Law Applicable Thereto

ARTICLE 1. Crimes, whatever may be the nationality of the agent, of the victim, or of the injured party, shall be tried by the tribunals, and punished according to the laws, of the State in whose territory they are committed.

ARTICLE 2. Crimes affecting two or more States and committed by one or more offenders, shall come under the jurisdiction of the judges or tribunals of the place where the said crimes were perpetrated; and the local laws must be applied in the corresponding proceedings.

If the crime was perpetrated in more than one country, it shall come under the jurisdiction of the tribunals of the first State to take judicial cognizance thereof, and the laws of that State must apply.

ARTICLE 3. In cases involving connected crimes committed by one or more offenders, whether as principals, as accomplices, or as harborers, in the territory of two or more signatory States, preference shall be given in regard to trial of the crime, to the authorities and penal law of the country in which the more serious offence was perpetrated, a matter which shall be left to the discretion of the requested State.

ARTICLE 4. In the cases to which Articles 2 and 3 refer, the judge of the proceedings shall communicate with the Executive Power, in order that the latter may notify the States interested in the trial, of the institution of proceedings.

ARTICLE 5. Acts committed in the territory of a given State, which are not susceptible of punishment according to its own laws but which are punishable by the State wherein they produce their effects, may not be tried by the judges or tribunals of the latter unless the offender shall be found within its jurisdiction.

A similar rule applies with respect to those crimes for which the extradition of the offenders is not authorized.

In cases involving acts committed by public functionaries who are serving in a foreign country, if such acts constitute a criminal violation of the specific duties attached to the office with which they have been entrusted, the foregoing rule shall not apply, and the said functionaries shall be tried and punished by the judges or tribunals of the offenders' own State, in conformity with its laws.

ARTICLE 6. Any of the signatory States may expel, in accordance with its laws, alien offenders who have taken refuge in its territory, provided that after the appropriate request has been presented to the authorities of the country where any of the extraditable crimes were committed, the surrender of the said offenders is not requested, through the channel of extradition, within ninety days.

ARTICLE 7. The principles of public international law shall be observed for the trial of crimes committed by any of the functionaries of a diplomatic mission or by any member of their respective suites.

A similar procedure shall be followed with respect to Chiefs of State and their suites; and also with respect to members of armed forces, when the crime has been committed within the bounds of the place where they are stationed, and bears a legal relationship to the said forces.

ARTICLE 8. Crimes committed on the high seas, whether on board airplanes, or on men-of-war, or on merchant ships, must be tried and punished according to the law of the State whose flag the vessel flies.

ARTICLE 9. Crimes perpetrated on board men-of-war or military planes of one State, while these are in the territorial waters of another State, shall be tried by the tribunals, and punished according to the laws, of the State to which the said men-of-war or airplanes belong.

If only persons who do not belong to the crew of the warship or airplane, participate in the commission, on board, of such acts, prosecution and punishment shall be conducted in accordance with the laws of the State within whose territorial waters the warship or airplane is located.

The laws of the country to which the ship or airplane belongs, shall also govern the trial and punishment of such punishable acts as are committed elsewhere than on board by members of the crew or by individuals charged with the exercise of some function on board, when the said acts affect only the disciplinary order of those ships or planes.

ARTICLE 10. Crimes committed on board vessels other than vessels of war shall be tried and punished by the judges or tribunals, and according to the laws, of the State in whose territorial waters a given vessel was located at the time when such a crime was committed.

If the crimes are committed on board private airplanes which are not in flight, the corresponding trial and imposition of punishment shall be conducted according to the laws, and by the judges, of the territory where the crimes occurred.

ARTICLE 11. Trial and punishment for crimes committed on board airplanes or on men-of-war or on merchant ships, under the conditions specified in Articles 2 and 3, shall be conducted according to the provisions laid down in those articles.

ARTICLE 12. For the purposes of criminal jurisdiction, territorial waters are declared to be those included in a belt five miles wide running along the coast of the mainland or of the islands which constitute part of the territory of the various States.

ARTICLE 13. A riparian State has the right to continue on the high seas a pursuit begun within its territorial waters, as well as the right to arrest and try the vessel that has committed an offence within the said waters. In all cases where a capture is effected on the high seas, that fact shall be communi-

cated without delay to the State whose flag the vessel flies. The pursuit must be broken off instantly when the vessel enters [other] territorial waters, or a port belonging to its own country or to a third State.

ARTICLE 14. International piracy, traffic in narcotics, white slavery, and the destruction or damage of submarine cables, are subject to the jurisdiction and law of the State into whose power the offenders may come, regardless of the place where such crimes were committed; but without prejudice to the preferential right of the State in which the criminal acts were perpetrated, to request the extradition of the offenders.

ARTICLE 15. Crimes committed on board airplanes in flight over a foreign State shall come under the jurisdiction of the latter if the airplane should make its first landing there. Otherwise, such jurisdiction shall appertain to the State in whose territory that first landing is made, and the laws of the subjacent State shall apply. When it is not possible to determine the territory over which the crime was committed, the case shall be governed by the law of the State whose flag the plane flies.

The pilot of an airplane in flight, who has been notified of the commission of a crime, is bound to land at the first known airport and inform the authorities of that port.

ARTICLE 16. Prescription of actions and of penalties shall be determined by the judges or tribunals, and in accordance with the laws, of the State to which cognizance of the crimes in question appertains.

ARTICLE 17. A judgment rendered in any of the signatory States shall be recognized in those States for the purpose of establishing the repetition or habitual commission of the offence, or a tendency thereto, on the part of the accused; and also in order to make it obligatory that he accede, while he is in their territory, to indemnification of the damage, to measures of security against his person, and to the interdiction resulting from the proceedings.

The signatory States shall furnish reports in regard to the judicial or police antecedents on file in their archives, if they are requested to do so by another interested State.

Title II. Of Extradition

CHAPTER I. OF THE SYSTEM OF EXTRADITION

ARTICLE 18. The contracting States bind themselves to surrender, if they are requested to do so, persons who have been prosecuted or condemned by the authorities of one of those States, and who are found in the territory of another.

The request for surrender shall be granted in accordance with the procedural formalities in force within the requested State, provided that the following conditions are both met:

(a) The person to be surrendered must have been condemned by final judgment to one year in prison, at least; or, if the case concerns an indicted person, the crime that constitutes the subject-matter of the prosecution

must be punishable, according to the laws of the requesting State, by a minimum intermediate penalty of two years' imprisonment. Half the sum of the extremes within which the particular penalty involving deprivation of liberty is fixed, shall be considered as the intermediate penalty.

(b) The requesting State must have jurisdiction to try and to pass sentence concerning the crime which motivates the demand, even when the acts involved have been committed outside the territory of the contracting States.

ARTICLE 19. The nationality of the accused may not be invoked as a reason for refusing extradition, except when a constitutional provision establishes otherwise.

ARTICLE 20. Extradition shall not be granted:

- (a) For the crime of duelling;
- (b) For the crime of adultery;
- (c) For the crimes of libel and slander, even when perpetrated through the medium of the press;
- (d) For political crimes;
- (e) For common crimes committed with a political purpose, except when, in the opinion of the judge or tribunal receiving the request, the common character manifestly predominates;

(f) For common crimes in cases where, in the opinion of the judge or tribunal of the requested State, it can be inferred from the attendant circumstances that the purpose in making that request is preponderantly political; essentially military crimes, exclusive of those governed by the laws of the requested State. If the person sought is charged with a military crime which is not provided for by the common law, he shall be surrendered with the reservation that he is to be tried only in accordance with the said law and by the tribunals;

When the person sought has been or is being tried, for the same act in accordance with the provisions of this treaty, in the requested State; or when the action or penalty has been invalidated by prescription, according to the laws of the requesting State, before the seizure of the accused;

(i) When the person sought would have to appear before a tribunal or court taking cognizance of exceptions.

The determination of the character of the offences involved appertains exclusively to the authorities of the requested State, on the basis of the law more favorable to the accused.

ARTICLE 21. No civil or commercial action involving the accused shall hinder his extradition.

ARTICLE 22. When the individual sought is deprived of his freedom by virtue of a prosecution or a service of sentence in the requested State, his surrender may be postponed until the restriction on his freedom has been removed, or the sentence has been served; but in the meantime, prescription of the action or penalty in question shall be suspended.

ARTICLE 23. The murder of the Chief of a contracting State, or an attempt upon his life, shall not be regarded as a political crime or act connected therewith.

ARTICLE 24. Persons whose extradition has been granted may not be tried for crimes previous to those on which the extradition is based.

Crimes constituting grounds for extradition may be tried and punished, provided that the requested State gives its consent previously and in conformity with the terms of this treaty.

ARTICLE 25. When the extradition of a given individual is demanded by different States, and the demands are based upon the same crime, preference shall be accorded to that of the State in whose territory the crime was perpetrated; or, if it was committed in different countries, preference shall be given to the first demand.

If different acts are involved, preference in granting the extradition shall be given to the State in whose territory the more serious crime was committed, according to the judgment of the requested State.

In cases involving different acts which the requested State regards as equally serious, the preference shall be determined by the order in which the requests are received.

ARTICLE 26. In the cases contemplated in paragraphs 2 and 3 of the foregoing article, the requested State may, as a condition of granting the extradition, stipulate that the person demanded must also be subject to extradition.

ARTICLE 27. In no case shall the death penalty be imposed for the crime for which extradition has been granted.

ARTICLE 28. The foregoing rules will apply in the case of persons condemned to measures of security, provided that the latter consist of imprisonment or restriction of freedom, and that for their extinction more than ten years has yet to elapse.

CHAPTER II. OF EXTRADITION PROCEDURE

ARTICLE 29. The demand for extradition must be made by the appropriate diplomatic agent or, in default thereof, either by the consular agents or directly from Government to Government; and it must be accompanied, according to whether the persons involved are accused or condemned persons, either by a copy of the order of imprisonment or judicial order providing for deprivation of freedom, issued by the competent authorities, or by an authenticated copy of the judgment of condemnation.

The records supplied must include a precise statement as to the act on which the charge is based, and the date and place of its occurrence. The said records shall be accompanied by copies of the laws applicable to the case, as well as by copies of those relative to prescription as it affects the action or penalty in question. Data and information regarding antecedents, to facilitate identification of the person sought, shall also be included.

ARTICLE 30. The demand for extradition of a condemned person cannot be based on a sentence rendered by default, that is to say, a sentence rendered when the accused has not been personally summoned to defend, or when he has been summoned but has not appeared. However, the requested extradition may be granted if the requesting State promises to reopen the case in such a way as to allow for the defence of the accused.

ARTICLE 31. If the demand for extradition has been made in due form, the requested Government shall send the documents on the case to the competent judge or tribunal, who must pass upon the propriety of the said demand, on the basis of the provisions contained in Articles 29 and 30; and, whenever the case warrants such action, the said judge or tribunal shall take the necessary steps for the apprehension of the person sought, ordering his arrest and the seizure of the articles involved in the crime, if they believe this to be the proper procedure.

ARTICLE 32. If the judge of the requested State considers that the demand is legally inadmissible because of some defect of form, he shall advise the judge of the requesting State as to what documents are lacking, and shall fix a reasonable time-limit for their remission.

ARTICLE 33. In cases where the arrest is made, the party concerned shall be informed of the cause of arrest within twenty-four hours.

Within a period of three days and no more, reckoned from the day following the notification, the interested party may oppose exceptions based on the following grounds:

- (a) Incompetence of the judge of the requested State who ordered the arrest;
- (b) The fact that the said party is not the person sought;
- (c) Defects of form in the documents presented;
- (d) Impropriety of the demand for extradition.

ARTICLE 34. In cases where it is necessary to verify the allegations, the question shall be laid open for proof; and the provisions of the procedural law of the requested State shall govern with respect to such proof and to the time allowed for it.

ARTICLE 35. When the proof has been produced, a decision on the question shall be reached without further proceedings, by a declaration as to whether or not grounds for extradition exist.

In cases where cognizance of the demand appertains originally to the judge of first instance, the decision shall be appealable to the competent tribunal.

ARTICLE 36. If the sentence is favorable to the demand for extradition, the tribunal which renders the decision shall communicate it immediately to the Executive Power, in order that he may take the steps necessary for the surrender of the culprit.

If the sentence is unfavorable, the judge or tribunal, once it has become final, shall order the immediate release of the prisoner and shall so advise

the Executive Power, enclosing a copy of the said sentence in order that the Executive may bring it to the knowledge of the requesting Government.

ARTICLE 37. If the prisoner acquiesces in the demand, the judge or tribunal shall draw up a statement regarding the terms of that acquiescence, and shall, without further proceedings, declare that extradition is proper.

ARTICLE 38. Articles found in the possession of the person sought, if they were acquired in consequence of the act in question, if they were used in its execution, if the act was perpetrated upon them, or if they constitute evidence in some other way, shall be seized and delivered to the demanding State, even though the extradition may fail to take place owing to the death or disappearance of the accused.

ARTICLE 39. In cases where the delivery of the accused is to be effected over a land route, the requested State shall transfer him to the most suitable point on the frontier.

When his transfer must be effected over a maritime, fluvial or air route, he shall be delivered to those agents whom the requesting State may appoint, at the most suitable port or airdrome of embarkation.

The requesting State may, in any case, appoint one or more police agents; but they shall act as subordinates of the agents or authorities representing the territory of the requested State, or that of the State of transit.

ARTICLE 40. If it should be necessary to traverse the territory of an intermediate State in order to surrender a prisoner whose extradition has been agreed to by one State in favor of another, such transit shall be permitted by the said intermediate State without any requirement other than the exhibition through diplomatic channels of the proper attestation, in the form of a decree of extradition which authorized the surrender.

ARTICLE 41. The expenses incurred in the extradition of the offender shall be borne by the requested State until the moment when the surrender takes place; and thenceforth, they shall be borne by the requesting Government.

ARTICLE 42. When extradition of a person under indictment has been accorded, the Government whose request was granted shall communicate to the Government that granted it, the final judgment pronounced in the case which constituted the grounds for extradition.

ARTICLE 43. When extradition has been accorded, and the person sought has been placed at the disposal of the diplomatic, consular or police agent of the demanding State, he shall be released if, within a period of forty days from the date of the pertinent communication, he has not been sent to his destination; always provided that no request for a reasonable delay has been presented. In such circumstances, no new demand based upon the same grounds will be admissible.

ARTICLE 44. When the request for extradition has been granted, the requesting State agrees to try the accused, in accordance with Article 24, exclusively for the act for which he was surrendered and not for any previous

act, unless he should remain voluntarily for more than thirty days, after being released, in the territory of the requested State.

ARTICLE 45. During the extradition proceedings the person detained may not be released on bail.

Title III. Of Provisional Arrest

ARTICLE 46. In urgent cases, the contracting States may request by post or by telegraph that steps be taken for the arrest of the accused and for the seizure of articles connected with the crime, once the nature of that crime has been determined and the existence of an order of imprisonment issued by a competent judge, has been invoked.

In such cases, the prisoner shall be released if, within sixty days from the date of his arrest, the formal demand for extradition, duly drawn up, has not been presented to the requested State.

When that interval has elapsed and the prisoner has been released, his arrest cannot be requested again until after the documents required by Article 29 have been presented.

ARTICLE 47. In cases of provisional arrest, the release of the accused shall be effected without prejudice to the retention of the articles mentioned in Article 38, for a reasonable time, to be fixed by the judges of the State which proceeded to the arrest and in accordance with the attendant circumstances.

ARTICLE 48. In all cases of provisional arrest, the responsibilities which may arise therefrom appertain to the State that requested it.

Title IV. General Provisions

ARTICLE 49. The simultaneous ratification of this treaty by all of the signatory States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 50. When the exchange has been made, in the form indicated by the preceding article, this Treaty shall be effective from that time forth indefinitely.

ARTICLE 51. If any of the contracting States should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 52. No demand for extradition in connection with a crime committed before the exchange of the ratifications of this treaty may be based upon the provisions therein contained.

ARTICLE 53. Article 49 applies also to States which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid nations sign the present treaty in Montevideo on the 19th day of March, 1940.

Reservation

The Delegation of the Argentine Republic reserves the right to differentiate between "political offender" and "international terrorist."

TREATY ON INTERNATIONAL COMMERCIAL TERRESTRIAL LAW *

Signed at Montevideo, March 19, 1940

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of the United States of Brazil; His Excellency the President of the Republic of Colombia; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Peru, and His Excellency the President of the Republic of Paraguay,

In the belief that the principles governing international commercial terrestrial law, which were confirmed by the Treaty on International Commercial Law signed at Montevideo on February 12, 1889, should be amplified in such a manner as to embrace the new concepts that have been accepted in regard to that matter,

Have agreed to conclude the present treaty through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose,

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS GUILLEMETTE.

His Excellency the President of the United States of Brazil has designated:

Dr. SEBASTIAN DO REGO BARROS,
Dr. HAHNEMANN GUIMARAES,
Dr. PEDRO BAPTISTA MARTINS,
Dr. MARIO BULHOES PEDREIRA, and
Dr. ALEXANDRE MARCONIES MACHADO, Jr.

His Excellency the President of the Republic of Colombia has designated:

Dr. ROBERTO URDANETA ARBELAEZ, and
Dr. RAIMUNDO RIVAS.

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 61-72.

His Excellency the President of the Republic of Bolivia has designated:

Dr. JORGE VALDES MUSTERS,
Dr. FEDERICO GUTIERREZ GRANIER, and
Dr. GUILLERMO FRANCOVICH.

His Excellency the President of the Argentine Republic has designated:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,
Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,
Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Republic of Peru has designated:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. JOSE JACINTO RADA.

His Excellency the President of the Republic of Paraguay has designated:

Dr. RAUL SAPENA PASTOR, and
Dr. EMILIO SAGUIER ACEVAL.

The said representatives, having presented their full powers, which were found to be in due form, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

Title I. Of Facts, Acts of Commerce and Merchants

ARTICLE 1. Facts and juridical acts shall be considered as civil or commercial, according to the law of the State where they occur.

ARTICLE 2. Attribution of the character of "merchant" to a given person is determined by the law of the State where that person has his commercial domicile. Registration and its effects are governed by the law of the State in which the registration is required.

ARTICLE 3. The commercial domicile is the place where the principal seat of business of the merchant or commercial partnership is located.

However, if such merchants or partnerships set up establishments, branches, or agencies in another State or in other States, they shall be considered as domiciled in the place where they operate, and as subject to the jurisdiction of the local authorities, in so far as concerns their transactions in that place.

ARTICLE 4. Merchants and auxiliary agents of commerce are subject, as regards the activities inherent in their trade, to the laws of the place where they conduct those activities.

ARTICLE 5. Books of account are subject, as regards kind, number and formalities, to the law of the place where the obligation to keep them is imposed.

The same law governs the obligation to exhibit such books.

The law governing the act for which proof is sought determines the admissibility of books of account as a means of such proof and their evidentiary value.

The form and mode of exhibition shall be subject to the law of the judge who intervenes in the said exhibition.

Title II. Of Partnerships

ARTICLE 6. The law of the commercial domicile determines the character of the document required for the partnership agreement.

Requirements relating to the form of the contract are determined by the law of the place where that contract is made.

Matters relating to forms of publicity are subject to such provisions as may be made by the respective States.

ARTICLE 7. The content of the partnership contract, as well as the juridical relations between partners, between them and the partnership, or between the latter and third parties, are governed by the law of the State where the partnership has its commercial domicile.

ARTICLE 8. Commercial partnerships shall be governed by the laws of the State of their commercial domicile, shall be accorded full legal recognition in the other contracting States, and shall be considered qualified to perform acts of commerce and to appear in law suits.

However, for the customary performance of the acts incident to the purposes which motivated their creation, they shall observe the provisions of the law of the State where they intend to perform those acts.

The representatives of such partnerships incur, with respect to third parties, the same responsibilities as those incurred by the administrators of local partnerships.

ARTICLE 9. Partnerships or corporations created in a given State, in a form unknown to the laws of another State, may perform acts of commerce in the latter, subject to the local laws.

ARTICLE 10. The legal requirements relative to the issuance or negotiation of stocks or bonds of commercial partnerships are determined by the law of the State in which such issues or negotiations are carried into effect.

ARTICLE 11. The judges of the State where the partnership has its domicile are competent to try actions which may arise between the partners in their character as such, or which third parties may institute against the partnership.

However, if a partnership domiciled in one State conducts, in another State, transactions which result in judicial controversies, it may be sued before the judges or tribunals of the latter.

Title III. Of Insurance

ARTICLE 12. Contracts of terrestrial insurance are governed by the law of the State where that property is situated which is the object of the insurance at the time when the contracts are concluded; and life insurance

contracts are governed by the law of the State where the insurance company, or its branches or agencies, are domiciled.

ARTICLE 13. The judges competent to try actions instituted in regard to terrestrial or life insurance, are those of the State whose laws govern the said contracts according to the provisions of the foregoing article; or alternatively, at the option of the plaintiff, either those of the State where the insurers, or their branches and agencies (in cases involving the latter), are domiciled, or those of the place where the insured parties have their domicile.

Title IV. Of Carriage by Land, and Mixed Carriage

ARTICLE 14. Contracts of carriage relating to merchandise, whose performance is destined to take place in different States, are governed as regards their form and effects, and the character of the obligations imposed upon the contracting parties, by the law of the place where the contracts are made. Those which are to be performed within the territory of one State only, shall be governed by the law of that State. The law of the State where the merchandise is, or should have been, delivered to the consignee, governs all matters connected with the performance and form of execution of the obligations involved in the said delivery.

ARTICLE 15. A contract of international carriage by joint services shall be regarded as a single contract, when it is concluded by issuing one direct bill of lading, even though the transportation is effected with the intervention of companies in different States.

This provision applies also to mixed carriage, by land, water or air.

ARTICLE 16. Actions based on international carriage by joint services may be instituted, at the option of the plaintiff, against the first carrier with whom the shipper contracted, or against the last one to receive the merchandise which was to be delivered to the consignee.

Such actions shall be instituted, at the option of the plaintiff, before the judges of the place of shipment, the judges of the place of destination, or those of any one of the places of transit where there is a representative of the carrier sued.

Actions instituted by the various carriers against each other are excepted.

ARTICLE 17. Contracts of carriage relating to the transportation of persons through the territories of different States, whether concluded by only one company or by joint services, are governed by the law of the State which is the passenger's destination.

The competent judges shall be those of the latter State, or those of the State where the contract was concluded, at the option of the plaintiff.

ARTICLE 18. Transportation of baggage which has been registered in a special document issued by the carrier or commission agent, and which is not taken along by the passenger in the place assigned to him for the trip, is governed by the rules for transportation of merchandise.

Baggage which the passenger takes with him and which has not been registered, is governed by the law applicable to transportation of persons.

Title V. Of Commercial Pledges

ARTICLE 19. The law which governs a particular contract of pledge determines the character of the corresponding document. The forms and requirements involved are regulated by the law of the place where the contract is made; the means of publicity, by the laws of the respective States.

ARTICLE 20. The rights and obligations of the contracting parties in regard to the object given as a pledge, are governed, whether that object has been moved or not, by the law of its location at the time when the pledge was constituted as such.

ARTICLE 21. A change in the location of the object given in pledge does not affect the rights acquired in accordance with the law of the State where the pledge was constituted as such; but, for the preservation of those rights, it is necessary to comply with the conditions of form and substance imposed by the law of the State of the said object's new location.

ARTICLE 22. In the case to which the foregoing article refers, the rights of *bona fide* third parties with respect to the object given in pledge, are regulated by the law of the State of that object's new location.

Title VI. Of Bills of Exchange and Other Instruments Payable to Order

ARTICLE 23. The form of drafts, endorsements, acceptances, guaranties, protests, and acts necessary for the exercise or preservation of rights relating to bills of exchange, shall be governed by the law of the State in whose territory the said acts are executed.

ARTICLE 24. If the obligations contracted in a bill of exchange are not valid under the law to which the preceding article refers, but do conform to the law of the State where an ulterior obligation has been contracted, the irregularity in the form of the said bill does not affect the validity of that obligation.

ARTICLE 25. Juridical relations which arise between the drawer and the payee of a bill of exchange, as a result of the drawing thereof, shall be governed by the law of the place where the bill was drawn; those which result between the drawer and the drawee shall be governed by the law of the locality where the acceptance was to take place.

ARTICLE 26. The obligations of the drawee with respect to the bearer and the exceptions which may favor the former, shall be regulated by the law of the locality where the acceptance took place.

ARTICLE 27. The juridical effects which endorsement produces as between the endorser and the transferee shall depend upon the law of the place where the bill was negotiated or endorsed.

ARTICLE 28. The juridical effects of acceptance by intervention shall be governed by the law of the State where the third party intervenes.

ARTICLE 29. The time-limit for bringing an action of reëchange is determined, for all the signers of a bill, by the law of the State in whose territory the obligation was created.

ARTICLE 30. A bill of exchange drawn in currency without legal rate in the State where it is collectible, shall be honored in the currency of that State at the rate of exchange corresponding to the date of maturity.

If the debtor delays payment, the bearer may demand, according to his preference, that the amount of the bill be paid at the rate of exchange corresponding to the date of maturity, or that it be paid at the rate corresponding to the date of payment.

If the amount of the bill is specified in currency which has the same name but different values in the State of issue and in the place of payment, it is presumed that the specification refers to the currency of the latter.

The law of the place of payment determines the other conditions and circumstances of payment, such as maturity occurring on holidays, days of grace, etc.

ARTICLE 31. The law of the State where the bill is to be paid determines the measures that should be taken in case of theft, loss, or destruction of the document, or circumstances rendering it materially useless.

ARTICLE 32. The provisions set forth under this title govern, in so far as they are applicable, in regard to vouchers, banknotes, and other instruments payable to order.

ARTICLE 33. The provisions set forth under this title also govern in regard to checks, with the following modifications:

The law of the State where the check is to be paid determines:

1. The time of presentation;
2. Whether or not the check can be accepted, crossed, certified or confirmed, and the effects of these operations;
3. The rights of the holder in regard to remittance of funds, and the nature of such funds;
4. The right of the drawer to revoke the check or to oppose payment;
5. The necessity of protest or some equivalent act, for the preservation of rights against the endorsers, the drawer, or other obligated parties;
6. Such other circumstances as relate to the modal attributes of the check.

ARTICLE 34. Rights arising from bills of exchange, checks, and other instruments payable to order or to the bearer, and the validity of obligations originating in such instruments, are not subordinated to observance of the provisions contained in the laws relative to the stamp tax. However, the laws of the contracting States may suspend the exercise of the said rights until payment has been made of the tax and of such penalties as may have been incurred.

ARTICLE 35. Questions arising between persons who have intervened in the negotiation of a bill of exchange, check, or other instrument payable to order or to the bearer, shall be laid before the judges of the place which was

the domicile of the defendants on the date when they incurred the obligation, or which is their domicile at the time of the action.

Title VII. Of Bonds and Instruments Payable to Bearer

ARTICLE 36. Formalities relative to bonds and other instruments payable to bearer, as well as the juridical effects of such instruments, are governed by the law in force within the State where these were issued.

ARTICLE 37. Transfer of bonds and instruments payable to bearer is regulated by the law of the State where the transfer is effected.

ARTICLE 38. The formalities and requirements which must be complied with, as well as the juridical effects which may result, in the cases contemplated in Article 31, are subject to the law of the debtor's domicile; and publicity may also be given to the matter in the other contracting States.

ARTICLE 39. In the cases specified in Article 31, the rights of the third holder in regard to the bonds or commercial instruments in question are regulated by the law of the State where he acquired possession.

Title VIII. Of Bankruptcy

ARTICLE 40. The judges competent to formulate an adjudication of bankruptcy, are those of the domicile of the merchant or commercial partnership involved, even though the latter may incidentally be engaged in acts of commerce within another State or other States, or may have in one or more of these, agencies or branches which operate in behalf, and on the responsibility, of the principal establishment.

ARTICLE 41. If the bankrupt has two or more independent commercial houses in different territories, the judges or tribunals of the respective commercial domiciles shall be competent to take cognizance of the proceedings in bankruptcy relative to each of the said houses.

ARTICLE 42. Adjudication of bankruptcy, and other acts relative thereto, whose publication is required by the laws of the State where the adjudication took place, shall also be publicly announced in the States where the bankrupt has agencies, branches or establishments; and such publication shall be effected in accordance with the formalities prescribed by the local laws.

ARTICLE 43. When adjudication of bankruptcy has been pronounced in a given State, the precautionary measures of security and conservation prescribed in the corresponding bankruptcy proceedings, shall also be enforced in regard to the property which the bankrupt may possess in other States; and this enforcement shall be effected in conformity with the local laws.

ARTICLE 44. Once the precautionary measures have been duly taken by means of the appropriate letters rogatory, the judge to whom the letters are addressed shall order the publication during a thirty-day period, in the places where the bankrupt possesses property, of advertisements announcing both the adjudication of bankruptcy and the measures which have been prescribed.

ARTICLE 45. Local creditors may institute in their respective States, within a period of sixty days after the last of the notifications mentioned in the foregoing article, new proceedings in bankruptcy against the bankrupt; or, if the circumstances do not permit an adjudication of bankruptcy, they may bring civil action against him. In such cases, the several proceedings in bankruptcy shall be conducted quite independently of one another, and the law of the State where each particular proceeding is instituted shall be applied thereto. Likewise, the corresponding laws shall apply to each distinct and separate proceeding, in all matters relative to the conclusion of precautionary agreements or to other, analogous measures. All of the foregoing provisions shall be interpreted without prejudice to compliance with the measures specified in Article 43, to the provisions of Article 47 under this Title, or to the objections which may be interposed by the assignees or representatives of the whole body of creditors involved in the other proceedings.

ARTICLE 46. The expression "local creditors," in regard to a bankruptcy case adjudicated in a given State, shall be interpreted as referring to those persons whose claims should be satisfied in the said State.

ARTICLE 47. In cases where more than one proceeding in bankruptcy may properly be instituted, according to the provisions set forth under this title, the balance left over in one State for the account of the bankrupt shall be placed at the disposal of the judge who has cognizance of the bankruptcy proceedings in another State, and the respective judges should come to a mutual understanding with that end in view.

ARTICLE 48. In cases where only one proceeding in bankruptcy is instituted, either because only one is proper under the provisions set forth in Article 40, or because the local creditors have not made use of the right conceded to them by Article 45, all of the creditors of the bankrupt shall present their claims and make use of their rights in conformity with the law, and before the judge or tribunal, of the State which has pronounced the adjudication of bankruptcy.

In such cases, the local claims existing in a particular State enjoy preference over those existing in other States, with respect to the sum total of the assets in the State where the former are located.

ARTICLE 49. The authority of the assignees or administrators, in cases involving a single bankruptcy proceeding, by whatsoever name they or their representatives may be designated, shall be recognized in all of the contracting States.

They may undertake measures of conservation or administration, appear in suits, and exercise the functions and rights accorded them by the laws of the State where the bankruptcy was adjudicated; but execution in regard to assets located outside of the jurisdiction of the judge who has cognizance of the proceeding must conform to the law of that location.

ARTICLE 50. Even when only one proceeding in bankruptcy is involved, mortgagees or pledgees constituted as such before the date of definitive stop-

page of payment may exercise their rights before the judges of the State where the property mortgaged or pledged is located.

ARTICLE 51. In cases involving more than one proceeding in bankruptcy, property belonging to the debtor and located in the territory of another State where no proceeding in bankruptcy, civil action of insolvency, or other, analogous proceeding has been instituted, shall form part of the bankruptcy assets in the particular proceeding whose judge has been the first to act.

ARTICLE 52. When more than one proceeding in bankruptcy is involved, the judge or tribunal within whose jurisdiction the bankrupt is domiciled shall be competent to dictate all measures of a civil character which may concern the latter personally.

ARTICLE 53. The rules relative to bankruptcy shall apply, in so far as is suitable, to judicial liquidations, precautionary agreements, suspensions of payment, and other analogous measures provided for in the laws of the contracting States.

General Provisions

ARTICLE 54. The simultaneous ratification of this treaty by all of the contracting States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other States to that effect. This procedure shall take the place of an exchange.

ARTICLE 55. When the exchange has been made, in the form indicated by the preceding article, this treaty shall be effective from that time forth indefinitely, among the States which shall have complied with the said formality; and the treaty signed in Montevideo, on the 12th of February, 1889, shall accordingly be without force.

ARTICLE 56. If any of the contracting States should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 57. Article 54 applies also to States which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid States sign the present treaty in Montevideo, on the 19th day of March, 1940.

Reservations

By the Delegation of the United States of Brazil:

The Delegation of Brazil, upon signing the present treaty, declares that the provisions of Article 45 apply in the cases contemplated in Articles 40 and 41.

By the Delegation of Colombia:

The Delegation of Colombia signs the present treaty, but gives to its pro-

visions the broadest possible interpretation, that is to say, the interpretation that the spirit of the treaty is in harmony with the constitutional provision in force in the Delegation's own country, to the effect that the capacity and recognition of partnerships and other juristic persons, and in general the rules regarding them, are determined by Colombian law.

TREATY ON INTERNATIONAL CIVIL LAW *

Signed at Montevideo, March 19, 1940

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Republic of Colombia; His Excellency the President of the Republic of Bolivia; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Peru, and His Excellency the President of the Republic of Paraguay,

In the belief that the principles governing international civil law, which were confirmed by the Treaty on International Civil Law signed at Montevideo on February 12, 1889, should be amplified in such a manner as to embrace the new concepts that have been accepted in regard to that matter,

Have agreed to conclude the present treaty through the medium of their respective plenipotentiaries, assembled in congress in the City of Montevideo as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and the Argentine Republic.

For the execution of this purpose,

His Excellency the President of the Oriental Republic of Uruguay has designated as his representatives:

Dr. JOSE IRURETA GOYENA,
Dr. PEDRO MANINI RIOS,
Dr. JUAN JOSE DE AMEZAGA,
Dr. JOSE PEDRO VARELA, and
Dr. ALVARO VARGAS GUILLEMETTE.

His Excellency the President of the Republic of Colombia has designated:

Dr. ROBERTO URDANETA ARBELAEZ, and
Dr. RAIMUNDO RIVAS.

His Excellency the President of the Republic of Bolivia has designated:

Dr. JORGE VALDES MUSTERS,
Dr. FEDERICO GUTIERREZ GRANIER, and
Dr. GUILLERMO FRANCOVICH.

His Excellency the President of the Argentine Republic has designated:

Dr. JUAN ALVAREZ,
Dr. DIMAS GONZALEZ GOWLAND,

*Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 73-85.

Dr. CARLOS M. VICO,
Dr. RICARDO MARCO DEL PONT,
Dr. CARLOS ALBERTO ALCORTA, and
Dr. JUAN AGUSTIN MOYANO.

His Excellency the President of the Republic of Peru has designated:

Dr. JOSE LUIS BUSTAMANTE I RIVERO, and
Dr. JOSE JACINTO RADA.

His Excellency the President of the Republic of Paraguay has designated:

Dr. RAUL SAPENA PASTOR, and
Dr. EMILIO SAGUIER ACEVAL.

The said representatives, having presented their full powers, which were found to be in due form, and after holding the appropriate conferences and discussions, have agreed upon the following provisions:

Title I. Of Persons

ARTICLE 1. The existence, status and capacity of physical persons, are governed by the law of their domicile. No incapacity of a penal character, and none based upon considerations of religion, race, nationality or opinion, shall be recognized.

ARTICLE 2. Change of domicile does not restrict capacity that has been acquired.

ARTICLE 3. States and other foreign juristic persons in public law may exercise their capacities in the territory of another State in conformity with the laws of the latter.

ARTICLE 4. The existence and capacity of juristic persons of a private character are governed by the laws of the country where they have their domicile.

The character with which they are invested, fully enables them to practice, outside the place where they were created, all the acts and rights properly pertaining to them.

However, for the habitual performance of acts comprised within the special purpose of their creation, they shall be subject to the provisions established by the State in which they intend to perform those acts.

The same rule shall apply to civil associations.

Title II. Of Domicile

ARTICLE 5. In those cases which are not specially provided for in the present treaty, the civil domicile of a physical person, in so far as international juridical questions are concerned, shall be determined, in the order indicated, by the circumstances enumerated immediately below:

1. Habitual residence in a given place, coupled with the intention to remain there;
2. In the absence of such a determining factor, the habitual residence in a

single place of the family group composed of the spouse and the minor or incompetent children; or that of the spouse with whom the said person lives; or, in the absence of a spouse, that of the minor or incompetent children with whom the person lives;

3. The location of his principal place of business;

4. In the absence of all of these circumstances, mere residence, which shall be regarded as constituting domicile.

ARTICLE 6. No person may be without a domicile; nor may he have two or more domiciles at one time.

ARTICLE 7. The domicile of incompetent persons subject to paternal control, guardianship or tutelage, is that of their legal representatives; and the domicile of the latter is the place where their representation is exercised.

ARTICLE 8. The conjugal domicile is the place where the spouses live together. In default thereof, the domicile of the husband shall be regarded as the conjugal domicile.

ARTICLE 9. A judicially separated or divorced wife retains the domicile of the husband as long as she does not acquire another domicile. A married woman abandoned by her husband retains the conjugal domicile, unless it is proved that she has established a separate domicile of her own, in another country.

ARTICLE 10. Juristic persons of a civil character have their domicile where their principal place of business is located.

Establishments, branches, or agencies created in one State by a juristic person whose domicile is in another State, are considered as domiciled in the place where they operate, in so far as concerns the acts which they perform there.

ARTICLE 11. In the event of a change of domicile, intent shall be determined, except upon proof to the contrary, by the declaration that the resident makes before the local authorities of the place to which he comes; or in default thereof, by the circumstances of the change.

Title III. Of Absence

ARTICLE 12. The juridical effects of a declaration of absence upon the property of the absentee are determined by the law of the place where that property is situated. The other juridical questions involving the absentee shall continue to be governed by the law which governed them previously.

Title IV. Of Marriage

ARTICLE 13. The capacity of persons to contract marriage, the form of the act by which it is contracted, the fact that the act did take place, and its validity, are governed by the law of the place where it was performed.

However, the signatory States are not bound to recognize a marriage performed in one of them when any of the following impediments vitiates the marriage:

(a) The fact that either of the contracting parties was under age, the minimum age required for the male being fourteen years, and for the female, twelve years;

(b) Kinship in a direct line by consanguinity or affinity, whether legitimate or illegitimate;

(c) Kinship between legitimate and illegitimate brother and sister;

(d) The fact of having put to death a spouse of one of the parties, either as principal or as accomplice, in cases involving intention to marry the surviving spouse;

(e) An earlier marriage not legally dissolved.

ARTICLE 14. The rights and duties of the spouses in all that refers to their personal relations are governed by the laws of the conjugal domicile.

ARTICLE 15. The law of the conjugal domicile governs:

(a) Conjugal separation;

(b) Dissolubility of the marriage; but recognition of the dissolubility shall not be obligatory upon the State where the marriage was solemnized, if the ground invoked for dissolution was divorce and if the local laws do not admit of that ground as such. In no case shall the celebration of a subsequent marriage, in accordance with the laws of another State, constitute the crime of bigamy;

(c) The effects of the nullity of a marriage contracted according to Article 13.

ARTICLE 16. Matrimonial contracts and the relations between spouses with respect to property, are governed by the law of the first conjugal domicile, in so far as is not prohibited, in matters of a strictly real character, by the law of the place where the property is located.

ARTICLE 17. Change of domicile does not effect any change in the law competent to govern the relations between spouses in regard to property, whether that property was acquired before or after the change.

Title V. Of Paternal Control

ARTICLE 18. Paternal control, with reference to personal rights and duties, is governed by the law of the domicile of the person who exercises such control.

ARTICLE 19. The same rule governs the rights and obligations inherent in paternal control over the property of children, as well as the transfer of such property and the other acts of which it may be the object, in so far as is not prohibited, in matters of a strictly real character, by the law of the place where the property is located.

Title VI. Of Filiation

ARTICLE 20. The law which governs the celebration of the marriage determines questions of legitimate filiation or of legitimation by subsequent marriage.

ARTICLE 21. Questions as to legitimacy of filiation which have no relation to the validity or nullity of the marriage are determined by the law of the conjugal domicile at the time of the child's birth.

ARTICLE 22. Rights and obligations in connection with illegitimate filiation are governed by the law of the State wherein they are to be made effective.

Title VII. Of Adoption

ARTICLE 23. Adoption is governed, in so far as relates to the capacity of the persons concerned, and with respect to the conditions, limitations and effects involved, by the laws of the domiciles of the parties, to the extent of their mutual conformity, provided that the act of adoption is evidenced by public indenture.

ARTICLE 24. Other juridical questions in which the parties may be involved, are governed by the laws to which the said parties are respectively subject.

Title VIII. Of Guardianship and Tutelage

ARTICLE 25. Appointment of guardians or tutors is governed by the law of the place where the incompetents in question have their domicile.

ARTICLE 26. The official status of a guardian or tutor appointed in any of the signatory States shall be recognized in the other signatory States.

The obligation to serve as guardian or tutor, and excuses in avoidance thereof, are governed by the law of the place where the person called to serve has his domicile.

ARTICLE 27. Rights and obligations inherent in the exercise of the guardianship or tutelage are governed by the law of the place where the incompetents have their domicile.

ARTICLE 28. The powers of the guardians and tutors with respect to property of the incompetents which is situated outside the place of the latter's domicile, are governed by the laws of the said domicile, in so far as is not prohibited, in matters of a strictly real character, by the law of the place where the property is located.

ARTICLE 29. Legal hypothecation conceded by the laws to incompetents shall have effect only when the law of the State where the office of guardian or tutor is discharged, is in accord with that of the State where the property affected by the hypothecation is located.

Title IX. Provisions Common to Titles IV, V and VIII

ARTICLE 30. Urgent measures which concern the personal relations between spouses, and the exercise of paternal control or of guardianship or tutelage, are governed, in each individual case, by the law of the place where the spouses, heads of family, guardians, or tutors reside.

ARTICLE 31. The remuneration which the laws grant to the parents, guard-

ians, and tutors, and the form which that remuneration takes, are governed and determined by the law of the State wherein the paternal control is exercised or the representatives were appointed.

Title X. Of Property

ARTICLE 32. Property, of whatsoever kind, is governed exclusively by the law of the place where it is located, in so far as concerns its classification, its possession, its absolute or conditional transfer ability, and all legal suits of a real character in which it may become involved.

ARTICLE 33. The *situs* of creditors' rights is held to be the place where the corresponding obligation is to be met. If this place cannot be determined at the time when such rights accrue, the domicile which the debtor has at that time shall be regarded as the *situs*.

Titles evidentiary of the said rights, and transferable by mere delivery, are regarded as having their *situs* in the place where they are found.

ARTICLE 34. A change in the location of movable property does not affect rights acquired in accordance with the law of the place where that property was located at the time of acquisition. However, the interested parties are bound to comply with the requirements of substance and form prescribed by the law of the new location for the acquisition and conservation of such rights.

A change in the location of a movable which is under litigation, effected after the commencement of the real action in question, does not alter the rules of legislative and judicial competency which were applicable originally.

ARTICLE 35. Rights acquired by third parties over the same property, in conformity with the law of its new location, after the change is effected and before the requirements above mentioned are complied with, take precedence over the rights first acquired.

Title XI. Of Juridical Acts

ARTICLE 36. The law which governs juridical acts determines the character of the corresponding documents. The forms and formalities relating to such juridical acts are governed by the law of the place where they are concluded or executed; the methods of publication, by the laws of the respective States.

ARTICLE 37. The law of the place where a contract is to be performed determines:

- (a) Its actual existence;
- (b) Its nature;
- (c) Its validity;
- (d) Its effects;
- (e) Its consequences;
- (f) Its execution;
- (g) In fine, all matters relative to the contracts, from every point of view.

ARTICLE 38. Consequently, contracts concerning things which are certain

and specific, are governed by the law of the place where those things were located at the time when the contract in question was concluded.

Contracts concerning things described under a general head, are governed by the law of the place where the debtor had his domicile when the contract was concluded.

Those concerned with consumable things are governed by the law of the place where the debtor had his domicile when the contract was concluded.

Those which relate to the rendering of services are governed:

(a) If they refer to things, by the law of the place where the said things were located when the contract was concluded;

(b) If their efficacy is bound up with some special locality, by the law of the place where the contract is to take effect;

(c) In other cases, by the law of the place where the debtor had his domicile, when the contract was concluded.

ARTICLE 39. Acts relating to charity are governed by the law of the benefactor's domicile.

ARTICLE 40. Acts and contracts whose place of performance cannot be determined according to the rules laid down in the preceding articles at the time when they are celebrated, are governed by the law of the place of celebration.

ARTICLE 41. Accessory contracts are governed by the law which governs the principal contract.

ARTICLE 42. The fulfilment of contracts concluded through correspondence or by agents, is governed in each case by the law of the place where the accepted offer originated.

ARTICLE 43. Obligations which originate apart from any agreement are governed by the law of the place where the lawful or unlawful act that gave rise to such an obligation took place, and, if necessary, by the law which regulates the corresponding juridical suits.

Title XII. Of Inheritances

ARTICLE 44. The law of the place where hereditary property is located at the time of death of the person whose estate is involved, governs the form of the testament.

Nevertheless, a nuncupative or sealed testament executed by solemn act in any of the contracting States, shall be accepted in all of the other States.

ARTICLE 45. The same law of location governs:

(a) The capacity of the heir or legatee to inherit;

(b) The validity and effects of the testament;

(c) The hereditary titles and rights;

(d) The existence and proportion of the legitime;

(e) The existence and amount of the available assets;

(f) In fine, everything relative to the legitime or testamentary estate.

ARTICLE 46. Debts which are to be paid in any of the contracting States

shall enjoy preference in regard to property located there at the time of the decedent's demise.

ARTICLE 47. If that property is not sufficient for payment of the said debts, the creditors shall recover a balance proportionally from the assets left by the decedent in other places, without prejudice to the preferential rights of the local creditors.

ARTICLE 48. When the debts are to be paid in a place where the debtor has left no assets, the creditors shall demand payment proportionally from the assets left in other places, subject to the reservation already specified in the preceding article.

Credits guaranteed by realty are not subject to the provisions of this article and the two which precede.

ARTICLE 49. Legacies of assets described under a general head, in cases where no place of payment is designated, are governed by the law of the testator's domicile at the time of his death. They shall be made effective through the assets which he may leave in the said domicile; and, in the absence of such assets, or for the purpose of completing the balance of the legacies, payment shall be made proportionally out of the other assets of the testator.

ARTICLE 50. The obligation to collate (*colacionar*)* is governed by the law which governs the inheritance, where collation is required.

If the hotch-pot consists of real or movable property, it will be restricted to the estate to which that property belongs.

When it consists of a sum of money, it shall be apportioned among all the estates to which the heir who owes the hotch-pot contributes, proportionally to his assets in each of them.

Title XIII. Of Prescription

ARTICLE 51. The extinctive prescription of personal actions is governed by the law to which the correlative obligations are subject.

ARTICLE 52. The extinctive prescription of real actions is governed by the law of the place where the property is located.

ARTICLE 53. If the property is movable and if its location has been changed, such prescription is governed by the law of the place where the time necessary for prescription has elapsed.

ARTICLE 54. Acquisitive prescription of movable or immovable property is governed by the law of the place where the property is situated.

* TRANSLATOR'S NOTE. — "Collation" (*colación*) in the Civil Law refers to the declaration which, in the distribution of an inheritance, the child or other legitimate descendant makes of the property which he received out of the paternal or maternal fortune during the lifetime of his parents; so that, added to the estate, such property may be considered as part of the assets which will go to him in the distribution (1 *Diccionario Enciclopédico de la Lengua Castellana*, new ed. by Zerolo, 'Colación' (9), p. 615). The New English Dictionary (Vol. 2, Pt. 2, p. 617) defines "Collation," as "The throwing together of the possessions of several persons, in order to [effect] an equal division of the whole stock; hotch-pot."

ARTICLE 55. If the property is movable and if its location has been changed, such prescription is governed by the law of the place where the time necessary for prescription has elapsed.

Title XIV. Of Jurisdiction

ARTICLE 56. Personal actions should be instituted before the judges of the place whose law governs the juridical act that constitutes the subject-matter of the action.

They may likewise be instituted before the judges of the defendant's domicile.

Territorial extension of jurisdiction is permitted if, after the action has been instituted, the defendant consents voluntarily to such an extension, always provided that the action in question relates to patrimonial personal rights.

The intention of the defendant must be expressed in a positive, and not in a fictitious form.

ARTICLE 57. The declaration of absence must be requested before the judge of the last domicile of the presumptive absentee.

ARTICLE 58. The judges of the place where a given tutor or guardian was appointed are competent to take cognizance of actions relative to accountings.

ARTICLE 59. Actions for annulment of marriage, divorce, or dissolution, and, in general, actions regarding all questions which affect the relations of spouses, shall be instituted before the judges of the conjugal domicile.

If the action arises between persons coming under the provisions of Article 9, the judge of the last conjugal domicile shall be competent to take cognizance thereof.

ARTICLE 60. The judges of the place where matrimonial property is located shall be competent to decide questions arising between spouses as to alienation of that property, or other acts which affect it, in matters of a strictly real character.

ARTICLE 61. The judges of the place of residence of the persons involved are competent to take cognizance of the measures to which Article 30 refers.

ARTICLE 62. The judges of the social domicile are competent to take cognizance of actions between partners which relate to the partnership.

ARTICLE 63. Actions to which succession by reason of death may give rise, shall be instituted before the judges of the places wherein the hereditary assets are located.

ARTICLE 64. Real actions and those known as mixed actions must be brought before the judges of the place where the thing at issue is located.

If such actions involve things located in different places, the action must be instituted before the judges of the various places where the things are respectively located.

General Provisions

ARTICLE 65. The simultaneous ratification of this treaty by all of the signatory States is not necessary in order to bring it into operation. The States which approve it shall communicate their approval to the Government of the Oriental Republic of Uruguay, so that the latter may notify the other contracting States to that effect. This procedure shall take the place of an exchange.

ARTICLE 66. When the exchange has been made, in the form indicated by the preceding article, this treaty shall be effective from that time forth indefinitely, among the States which shall have complied with the said formality; and the treaty signed in Montevideo on the 12th of February, 1889, shall accordingly be without force.

ARTICLE 67. If any of the signatory States should deem it advisable to withdraw its adherence to the treaty or introduce changes into the said instrument, it shall so advise the other signatories; but the withdrawal shall not take effect until two years after the date of denunciation, during which time an effort to reach a new accord shall be made.

ARTICLE 68. Article 65 applies also to States which have not attended this Congress, but which wish to adhere to the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid States sign the present treaty in Montevideo, on the 19th day of March, 1940.

Reservations

By the Delegation of the Oriental Republic of Uruguay:

The Delegation of Uruguay makes a reservation with respect to Articles 9 and 59, believing that the application of their content would result, in so far as many cases of a real character are concerned, in abandonment of the general principle of domicile which has been adopted as a fundamental basis of this treaty, for the determination of the legislative and judicial competency of the contracting States.

By the Delegation of the Republic of Peru:

1. The articles of this treaty relative to the status and capacity of physical and juristic persons should be understood as approved by Peru without prejudice to the provisions of its own national law, in so far as concerns Peruvians and juristic persons established as such in Peru.

2. The rules adopted in this convention on legislative and judicial competency, in all cases referring to persons, family rights, personal relations between spouses and the administration of property, shall not interfere with the application of the provisions of Peruvian law in favor of Peruvian nationals.

3. It must be understood that Article 11 of this treaty is approved without prejudice to the provisions of the last part of Article 20 of the Civil Code of Peru.

4. Peru refrains from voting on Articles 15 and 22 of this treaty, because

it is bound by the rules which the Bustamante Code establishes regarding the law applicable to matrimonial matters and to filiation.

5. It must be understood that Article 36 is approved without prejudice to the optative law adopted in Article XX of the Preliminary Title of the Peruvian Civil Code, regarding the form of juridical acts and indentures.

6. Peru abstains from voting on Articles 37 to 39 of this treaty, because of their conflict with the provisions of Article VII of the Preliminary Title of the Peruvian Civil Code.

7. Neither does it vote for Articles 44 and 45; because it deems that the law applicable to the form of testaments should be that of the place of execution thereof, or that of the testator's domicile, and also because, with reference to the administration of estates, the law applicable in Peru is the law established by Article VIII of the Preliminary Title of the Peruvian Civil Code.

8. The Delegation understands that the proper jurisdiction for the cases referred to in Article 63 of this treaty is that of the place by whose law the estate in question is governed, according to Article VIII of the Preliminary Title of the Peruvian Civil Code.

ADDITIONAL PROTOCOL *

The plenipotentiaries of the Governments of the Oriental Republic of Uruguay, the Republic of the United States of Brazil, the Republic of Colombia, the Republic of Bolivia, the Argentine Republic, the Republic of Chile, the Republic of Peru and the Republic of Paraguay, perceiving the advisability of establishing general rules for the application of the laws of any contracting State within the territory of the other contracting States, in the cases specified by the treaties which have been concluded regarding the various aspects of private international law, have agreed upon the following provisions:

ARTICLE 1. The laws of the contracting States shall apply in such cases as may arise, whether the persons interested in the particular juridical situation involved are nationals or aliens.

ARTICLE 2. Application of those laws shall be made *ex officio* by the judge of the case, without prejudice to the right of the parties to allege and prove the existence and content of the law invoked.

ARTICLE 3. All remedies allowed by the legal rules of procedure of the place where the trial is held, for cases decided according to the laws of that place itself, shall likewise be admissible for those which may be decided by applying the laws of any of the other States.

ARTICLE 4. The laws of other States shall never be applied adversely

* Translated from *Segundo Congreso Sudamericano de Derecho Internacional Privado, Acta Final, Segunda Edición*, Montevideo, 1940, pp. 86-88.

to the political institutions, laws of public order, or good moral habits of the place where the trial is held.

ARTICLE 5. The jurisdiction and law which are applicable according to the respective treaties, may not be modified at the will of the parties, except in so far as the said law may authorize such modifications.

ARTICLE 6. In accordance with the provisions of this protocol, the various Governments agree to transmit to one another two authenticated copies of the laws now in force, and of those which may subsequently come into force, within the respective States.

ARTICLE 7. The Governments of the signatory States shall declare, upon approving the treaties which have been concluded, whether or not they agree to the adhesion of States not invited to this Congress, by the same process that is provided for the adhesion of those which have adhered to the idea motivating the Congress but have not participated in its deliberations.

ARTICLE 8. The provisions laid down in the foregoing articles shall be regarded as an integral part of the treaties in question, and they shall remain in force during the same period of time.

In Witness Whereof, the plenipotentiaries above mentioned, sign this protocol in Montevideo, on the 19th day of March, 1940.

Reservation

By the Delegation of the Republic of Peru:

1. The Delegation of Peru repeats, with respect to the subject-matter of Articles 1 and 2 of this Protocol, the reservations which it formulated in connection with the Treaty on International Civil Law.

2. The Delegation interprets Article 5 of this Protocol as meaning that the will of the parties cannot alter the rules established by the Treaties in regard to legislative and judicial competency.

TREATY ON TRADE-MARKS *

Signed at Montevideo, January 16, 1889

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Bolivia; His Excellency the Emperor of Brazil; His Excellency the President of the Republic of Chile; His Excellency the President of the Republic of Paraguay and His Excellency the President of the Republic of Peru, have agreed to conclude a Treaty on Trade-Marks, through the medium of their plenipotentiaries, assembled in Congress, in the City of Montevideo, as a result of the initiative taken by the Govern-

*Translation based upon text in International American Conferences. Reports of Committees and Discussions thereon, Washington, 1890, Vol. II, pp. 565-566; and De Martens, *Nouveau Recueil Général de Traité*s, 2d sér., Vol. 18, pp. 453-455.

ments of the Oriental Republic of Uruguay and of the Argentine Republic, the respective representatives being:

For His Excellency the President of the Oriental Republic of Uruguay:

Dr. ILDEFONSO GARCÍA LAGOS, Minister of Foreign Affairs, and
Dr. GONZALO RAMÍREZ, Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic.

For His Excellency the President of the Argentine Republic:

Dr. ROQUE SAENZ PEÑA, Envoy Extraordinary and Minister Plenipotentiary to the Oriental Republic of Uruguay, and
Dr. MANUEL QUINTANA, Academician of the Faculty of Law and Social Sciences of the University of Buenos Aires.

For His Excellency the President of the Republic of Bolivia:

Dr. SANTIAGO VACA-GUZMAN, Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic.

For His Excellency the Emperor of Brazil:

Dr. DOMINGOS DE ANDRADE FIGUEIRA, Counselor of State and Deputy to the General Legislative Assembly.

For His Excellency the President of the Republic of Chile:

Mr. GUILLERMO MATTA, Envoy Extraordinary and Minister Plenipotentiary to the Oriental Republic of Uruguay and to the Argentine Republic, and
Mr. BELISARIO PRATS, Minister of the Supreme Court of Justice.

For His Excellency the President of the Republic of Paraguay:

Dr. BENJAMIN ACEVAL, and
Dr. JOSÉ Z. CAMINOS.

For His Excellency the President of the Republic of Peru:

Dr. CESÁREO CHACALTANA, Envoy Extraordinary and Minister Plenipotentiary to the Oriental Republic of Uruguay and to the Argentine Republic, and
Dr. MANUEL MARÍA GÁLVEZ, Member of the Supreme Court of Justice.

Who, after exhibiting their full powers, which were found in due form, and after holding the appropriate conferences and discussions, have agreed upon the following stipulations:

ARTICLE I

Any person to whom shall be granted in one of the contracting States the exclusive right to a trade-mark shall enjoy the same privilege in the other

States, but with due respect to the formalities and conditions established by their laws.

ARTICLE II

The ownership of a trade-mark shall include the right to use or to sell or otherwise convey it.

ARTICLE III

By trade-mark shall be understood the sign, emblem, or exterior motto which the merchant or manufacturer adopts and applies to his wares and products in order to distinguish them from those of other dealers or manufacturers trading in articles of the same character.

To this class of marks shall belong those called trade devices, or designs, which by means of weaving or stamping are affixed to the product exposed for sale.

ARTICLE IV

Counterfeits or alterations of trade-marks shall be prosecuted before the courts, according to the laws of the State in whose territory the fraud was committed.

ARTICLE V

The simultaneous ratification of all the contracting nations shall not be necessary to the effectiveness of this treaty. Those who adopt it will communicate the fact to the Governments of the Argentine Republic and the Oriental Republic of Uruguay, who will inform the other contracting nations. This formality will take the place of an exchange.

ARTICLE VI

The exchange having been made in the manner prescribed in the foregoing article, this treaty shall remain in force for an indefinite period after that act.

ARTICLE VII

If any of the contracting nations should deem it advisable to be released from this treaty, or to introduce modifications into it, said nation shall inform the rest; but it shall not be released until two years after the date of notification, during which time measures will be taken to effect a new arrangement.

ARTICLE VIII

The provisions of Article V are extended to all the nations which, although not represented in this Congress, may desire to adopt the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid nations sign and seal the foregoing to the number of seven copies, in Montevideo, on the 16th day of January, 1889.

TREATY ON PATENTS OF INVENTION *

Signed at Montevideo, January 16, 1889

His Excellency the President of the Oriental Republic of Uruguay; His Excellency the President of the Argentine Republic; His Excellency the President of the Republic of Bolivia; His Excellency the Emperor of Brazil; His Excellency the President of the Republic of Chile; His Excellency the President of the Republic of Paraguay, and His Excellency the President of the Republic of Peru, have agreed to conclude a Treaty on Patents of Invention, through the medium of their plenipotentiaries, assembled in congress, in the City of Montevideo, as a result of the initiative taken by the Governments of the Oriental Republic of Uruguay and of the Argentine Republic, the respective representatives being:

For His Excellency the President of the Oriental Republic of Uruguay:

Dr. ILDEFONSO GARCÍA LAGOS, Minister of Foreign Affairs, and
Dr. GONZALO RAMÍREZ, Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic.

For His Excellency the President of the Argentine Republic:

Dr. ROQUE SAENZ PEÑA, Envoy Extraordinary and Minister Plenipotentiary to the Oriental Republic of Uruguay, and
Dr. MANUEL QUINTANA, Academician of the Faculty of Law and Social Sciences of the University of Buenos Aires.

For His Excellency the President of the Republic of Bolivia:

Dr. SANTIAGO VACA-GUZMAN, Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic.

For His Excellency the Emperor of Brazil:

Dr. DOMINGOS DE ANDRADE FIGUEIRA, Counselor of State and Deputy to the General Legislative Assembly.

For His Excellency the President of the Republic of Chile:

Mr. GUILLERMO MATTA, Envoy Extraordinary and Minister Plenipotentiary to the Argentine Republic and the Oriental Republic of Uruguay, and

Mr. BELISARIO PRATS, Minister of the Supreme Court of Justice.

For His Excellency the President of the Republic of Paraguay:

Dr. BENJAMÍN ACEVAL, and
Dr. JOSÉ Z. CAMINOS.

For His Excellency the President of the Republic of Peru:

Dr. CESÁREO CHACALTANA, Envoy Extraordinary and Minister Pleni-

* Translation based upon text in International American Conference, Reports of Committees and Discussions thereon, Washington, 1890, Vol. II, pp. 566-568; and De Martens, *Nouveau Recueil Général de Traités*, 2d sér., Vol. 18, pp. 421-423.

potentiary to the Argentine Republic and the Oriental Republic of Uruguay, and

Dr. MANUEL MARÍA GÁLVEZ, Member of the Supreme Court of Justice.

Who, after exhibiting their full powers, which were found in due form, and after holding the appropriate conferences and discussions, have agreed upon the following stipulations:

ARTICLE I

Any person who shall obtain a patent or privilege of invention in any of the contracting States shall enjoy in all the others the rights of inventor, if within a year at the utmost he shall cause his patent to be registered in the form prescribed by the laws of the country in which he shall ask for its recognition.

ARTICLE II

The duration of the privilege shall be that fixed by the laws of the country in which it is to take effect. This period may be limited to that prescribed by the laws of the State in which the patent was first granted, if such period be the shorter.

ARTICLE III

Questions arising as to the priority of invention shall be settled according to the date of the request for the respective patents in the country where they were granted.

ARTICLE IV

By invention or discovery shall be understood any new method, mechanical or manual apparatus, for the manufacture of industrial products; the discovery of any new industrial product, and the application of perfected methods for obtaining results superior to any previously known.

No patents shall be granted—

(1) To inventions or discoveries already made public in any of the contracting States, or in others not bound by this treaty.

(2) To those contrary to good morals or to the laws of the country in which the patents are to be issued or recognized.

ARTICLE V

The rights of the inventor shall include that of enjoying the use of his invention and of transferring it to others.

ARTICLE VI

Those persons interfering in any way with the rights of the inventor shall be prosecuted and punished according to the laws of the country in which the offense may be committed.

ARTICLE VII

The simultaneous ratification of all the contracting nations shall not be necessary to the effectiveness of this treaty. Those who adopt it will communicate the fact to the Governments of the Argentine Republic and the Oriental Republic of Uruguay, which will inform the other contracting nations. This formality will take the place of an exchange.

ARTICLE VIII

The exchange having been made in the manner prescribed in the foregoing article, this treaty shall remain in force for an indefinite period after that act.

ARTICLE IX

If any of the contracting nations should deem it advisable to be released from this treaty, or to introduce modifications in it, said nation shall so inform the rest; but it shall not be released until two years after the date of notification, during which time measures will be taken to effect a new arrangement.

ARTICLE X

The provisions of Article VII are extended to all nations which, although not represented in this Congress, may desire to adopt the present treaty.

In Witness Whereof, the plenipotentiaries of the aforesaid nations sign and seal the foregoing to the number of seven copies, in Montevideo, on the 16th day of January, 1889.

UNITED NATIONS CONFERENCE ON FOOD AND AGRICULTURE*

TEXT OF THE FINAL ACT¹

The Governments of Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia; the French Representatives; the Governments of Great Britain, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Poland, Union of South Africa, Union of Soviet Socialist Republics, United States of America, Uruguay, Venezuela, and Yugoslavia;

Having accepted the invitation extended to them by the Government of the United States of America to be represented at a United Nations Conference on Food and Agriculture;

Appointed their respective delegates, who are listed below by countries in the order of alphabetical precedence:**

Who met at Hot Springs, Virginia, on May 18, 1943, under the temporary Presidency of The Honorable Marvin Jones, Chairman of the Delegation of the United States of America.

The Honorable Henrik de Kauffmann, Danish Minister at Washington, attended the sessions in response to an invitation of the Government of the United States to be present in a personal capacity.

Warren Kelchner, Chief of the Division of International Conferences, Department of State of the United States, was designated, with the approval of the President of the United States, as Secretary General of the Conference, and Ralph H. Allee, Chief, Division of Latin American Agriculture, Office of Foreign Agricultural Relations, United States Department of Agriculture, as Assistant Secretary General.

The Honorable Marvin Jones, Chairman of the Delegation of the United States of America, was elected permanent President of the Conference at the Plenary Session held on May 18, 1943.

The Executive Committee of the Conference, composed of the Chairman of the Delegations, and presided over by the President of the Conference, constituted a Steering Committee of its members composed of the following:

Marvin Jones (U.S.A.), President of the Conference, *Chairman*
João Carlos Muniz (Brazil)
G. S. H. Barton (Canada)
Kuo Ping-wen (China)
Richard Law (Great Britain)
Sir Girja Shankar Bajpai (India)

* Text from Department of State *Conference Series 52*.

** Names of delegates are omitted.

¹ Numbered footnotes in the Final Act appear in the original.—EDITOR.

Ali Jawdat (Iraq)
 Manuel J. Zevada (Mexico)
 M. P. L. Steenberghe (Netherlands)
 Alexey D. Krutikov (U.S.S.R.)
 Branko Cubrilovic (Yugoslavia)

The following three members of the Executive Committee served on the Committee on Credentials of the Conference:

J. Rafael Oreamuno (Costa Rica), *Chairman*
 Mohammed Shayesteh (Iran)
 Anders Fjelstad (Norway)

The Drafting Committee, composed of the Chairmen of the Technical Sections and three additional members appointed by the President of the Conference, was constituted as follows under the ex-officio Chairmanship of the Conference President:

João Carlos Muniz (Brazil)
 G. S. H. Barton (Canada)
 Kuo Ping-wen (China)
 Héctor David Castro (El Salvador)
 Richard Law (Great Britain)
 Hugues Le Gallais (Luxembourg)
 Alexey D. Krutikov (U.S.S.R.)

In accordance with the regulations adopted at the opening Plenary Session, held on May 18, 1943, the Conference was divided into four Technical Sections, with Committees, as follows:

SECTION I

Consumption Levels and Requirements

Chairman: Kuo Ping-wen (China)
Vice Chairman: Manuel J. Zevada (Mexico)
Reporter: W. R. Aykroyd (India)
Secretary: Frank G. Boudreau (U.S.A.)
Assistant Secretary: E. F. Penrose (U.S.A.)

COMMITTEE 1

Chairman: Karl Evang (Norway)
Vice Chairman: Tsou Ping-wen (China)
Vice Chairman: Miguel Etchenique (Bolivia)
Secretary: Hazel K. Stiebelling (U.S.A.)
Assistant Secretary: Katherine Bain (U.S.A.)

A. Food

1. Character and extent of consumption deficiencies in each country
2. Causes and consequences of malnutrition
3. Reasonable national and international goals for improved food consumption

COMMITTEE 2

Chairman: Roberto E. MacEachen (Uruguay)
Vice Chairman: Edouard J. Bigwood (Belgium)

Vice Chairman: J. Manuel Casanueva (Chile)

Secretary: Harold A. Vogel (U.S.A.)

A. Food

4. Measures for improving standards of consumption (education, etc.)

COMMITTEE 3

Chairman: José Garibaldi Dantas (Brazil)

Vice Chairman: Cimon P. Diamantopoulos (Greece)

Vice Chairman: Gabriel L. Dennis (Liberia)

Secretary: A. W. Palmer (U.S.A.)

B. Other essential agricultural products

1. Pre-war consumption levels in various countries as influenced by prosperity or depression and by buying power of the population

2. Reasonable national and international goals for improved consumption with sustained employment and expanded industrial activity

SECTION II

Expansion of Production and Adaptation to Consumption Needs

Chairman: Alexey D. Krutikov (U.S.S.R.)

Vice Chairman: Sir Girja Shankar Bajpai (India)

Reporter: Murray D. Lincoln (U.S.A.)

Secretary: F. F. Elliott (U.S.A.)

Assistant Secretary: Clayton Whipple (U.S.A.)

COMMITTEE 1

Chairman: G. S. H. Barton (Canada)

Vice Chairman: J. M. Troncoso (Dominican Republic)

Vice Chairman: Yilma Deressa (Ethiopia)

Secretary: Bushrod W. Allin (U.S.A.)

A. Measures for direction of production toward commodities, the supply of which should be increased

B. Measures for shifting production out of commodities in chronic surplus

COMMITTEE 2

Chairman: Héctor David Castro (El Salvador)

Vice Chairman: Stefan Krolikowsky (Poland)

Vice Chairman: César García Álvarez (Colombia)

Secretary: Philip V. Cardon (U.S.A.)

C. Measures for improving agricultural productivity and efficiency

COMMITTEE 3

Chairman: Joaquín M. Elizalde (Philippine Commonwealth)

Vice Chairman: Roberto Alamo Ibarra (Venezuela)

Vice Chairman: París E. Menéndez (Paraguay)

Secretary: Mark L. Nichols (U.S.A.)

D. Measures for development and conservation of agricultural resources

COMMITTEE 4

Chairman: E. McCarthy (Australia)

Vice Chairman: André Liataud (Haiti)

Vice Chairman: Marcos Carías Reyes (Honduras)

Secretary: Conrad Taeuber (U.S.A.)

E. Opportunities for occupational adjustments in agricultural populations

SECTION III

Facilitation and Improvement of Distribution

Chairman: João Carlos Muniz (Brazil)

Vice Chairman: Branko Cubrilovic (Yugoslavia)

Reporter: G. H. C. Hart (Netherlands)

Secretary: Howard S. Piquet (U.S.A.)

COMMITTEE 1

Chairman: J. P. R. Maud (Great Britain)

Vice Chairman: Jan V. Hyka (Czechoslovakia)

Vice Chairman: Gerardo Klinge (Peru)

Secretary: Frank A. Waring (U.S.A.)

A. Relation of national and international economic policies to agricultural problems, with special reference to the facilitation of the movement of agricultural products in commerce

1. Expansion of international trade

2. Broad policies for assuring increased production and consumption in general

COMMITTEE 2

Chairman: G. A. Duncan (New Zealand)

Vice Chairman: Eduardo Morillo Safa (Mexico)

Vice Chairman: Ramón Antonio Vega (Panama)

Secretary: Frederick L. Thomsen (U.S.A.)

B. Improvement of agricultural marketing, processing, and distribution

COMMITTEE 3

Chairman: Hervé Alphand (French Delegation)

Vice Chairman: A. P. van der Post (South Africa)

Vice Chairman: Alfredo Peñaherrera Vergara (Ecuador)

Secretary: Frederick V. Waugh (U.S.A.)

Assistant Secretary: Faith M. Williams (U.S.A.)

C. Special measures for wider food distribution

1. Improvement of consumption of low-income groups

2. International disposition of commodities in over-supply

COMMITTEE 4

Chairman: M. P. L. Steenberghe (Netherlands)

Vice Chairman: Hussein Bey M. Enan (Egypt)

Vice Chairman: Julio Gómez Robles (Guatemala)

Secretary: Robert M. Carr (U.S.A.)

D. Buffer stocks and commodity arrangements to assure equitable prices and adequate supplies

SECTION IV

Recommendations for Continuing and Carrying Forward the Work of the Conference

Chairman: Richard Law (Great Britain)

Vice Chairman: Amadeo López Castro (Cuba)

Reporter: F. L. McDougall (Australia)

Secretary: Loyd V. Steere (U.S.A.)

Assistant Secretary: Benjamin Gerig (U.S.A.)

The final Plenary Session was held on June 3, 1943. As a result of the deliberations, as recorded in the minutes and reports of the respective Committees and Sections and of the Plenary Sessions, the United Nations Conference on Food and Agriculture approved the following declaration, resolutions, and recommendations.

I. DECLARATION

This Conference, meeting in the midst of the greatest war ever waged, and in full confidence of victory, has considered the world problems of food and agriculture and declares its belief that the goal of freedom from want of food, suitable and adequate for the health and strength of all peoples, can be achieved.

1. The first task is to complete the winning of the war and to deliver millions of people from tyranny and from hunger. During the period of critical shortage in the aftermath of war, freedom from hunger can be achieved only by urgent and concerted efforts to economize consumption, to increase supplies and distribute them to the best advantage.

2. Thereafter we must equally concert our efforts to win and maintain freedom from fear and freedom from want. The one cannot be achieved without the other.

3. There has never been enough food for the health of all people. This is justified neither by ignorance nor by the harshness of nature. Production of food must be greatly expanded; we now have knowledge of the means by which this can be done. It requires imagination and firm will on the part of each government and people to make use of that knowledge.

4. The first cause of hunger and malnutrition is poverty. It is useless to produce more food unless men and nations provide the markets to absorb it. There must be an expansion of the whole world economy to provide the purchasing power sufficient to maintain an adequate diet for all. With full employment in all countries, enlarged industrial production, the absence of exploitation, an increasing flow of trade within and between countries, an orderly management of domestic and international investment and currencies, and sustained internal and international economic equilibrium, the food which is produced can be made available to all people.

5. The primary responsibility lies with each nation for seeing that its own people have the food needed for life and health; steps to this end are for national determination. But each nation can fully achieve its goal only if all work together.

6. We commend to our respective governments and authorities the study and adoption of the findings and recommendations of this Conference and urge the early concerted discussion of the related problems falling outside the scope of this Conference.

7. The first step toward freedom from want of food must not await the final solution of all other problems. Each advance made in one field will

strengthen and quicken advance in all others. Work already begun must be continued. Once the war has been won decisive steps can be taken. We must make ready now.

II. INTERIM AND PERMANENT COMMISSIONS FOR CARRYING OUT THE RECOMMENDATIONS OF THE UNITED NATIONS CONFERENCE ON FOOD AND AGRICULTURE

WHEREAS:

1. Freedom from want is difficult to achieve without concerted action among all like-minded nations to expand and improve production, to increase employment, to raise levels of consumption, and to establish greater freedom in international commerce;

2. The successful carrying out of the recommendations of the Conference in the field of production, distribution, and consumption of food and other agricultural products in the post-war period will be the most important prerequisite for the achievement of freedom from want, and requires the creation by the governments and authorities here represented of a permanent organization in the field of food and agriculture; therefore

The United Nations Conference on Food and Agriculture

Recommends:

1. That the governments and authorities here represented recognize and embody in a formal declaration or agreement the obligation to their respective peoples and to one another, henceforth to collaborate in raising levels of nutrition and standards of living of their peoples, and to report to one another on the progress achieved;

2. That the governments and authorities here represented establish a permanent organization in the field of food and agriculture; and

Resolves:

1. That in order that every practicable step may be taken to attain these and the other appropriate objectives set forth in the declaration and specific recommendations of the Conference, an Interim Commission for carrying out the recommendations of the United Nations Conference on Food and Agriculture be established.

2. That each of the governments and authorities here represented be entitled to designate a representative on the Interim Commission, and that the Interim Commission be installed in Washington not later than July 15, 1943;

3. That the Interim Commission perform its work with due regard to the exigencies of the war, through such form of organization and personnel as it may deem appropriate; and formulate regulations covering its expenditures and submit to the member governments and authorities a budget and allocation of quota contributions;

4. That the functions of the Interim Commission be to formulate and recommend for consideration by each member government or authority:

(a) A specific plan for a permanent organization in the field of food and agriculture;

(b) The formal declaration or agreement referred to in the first recommendation, in which each participant shall recognize its obligation:

(i) To raise the levels of nutrition and standards of living of its own people;

(ii) To improve the efficiency of agricultural production and distribution;

(iii) To cooperate, so far as may be possible, with other nations for the achievement of these ends;

(iv) To undertake to submit periodically to the other participants, through the permanent organization, reports on the action taken and the progress achieved toward these ends;

(c) Such proposals or reports as are necessary to give effect to the recommendations of the Conference;

5. That in the preparation of a plan for the permanent organization the Interim Commission give full consideration to the following:

(a) The relation of the permanent organization to, and methods of associating it with, other institutions, national as well as international, which already exist or which may hereafter be established, in the field of food and agriculture and in related scientific, economic, and other fields;

(b) Provision for membership in the permanent organization, in due course, of governments not represented on the Interim Commission;

6. That in considering the functions and duties to be assigned to the permanent organization the Interim Commission take into account:

(a) The promotion of scientific, technological, social, and economic research;

(b) The collection and dissemination of information and provision for the exchange of services;

(c) The submission to member governments and authorities of recommendations for action with regard to the following:

(i) Nutrition;

(ii) Standards of consumption of food and other agricultural products;

(iii) Agricultural production, distribution, and conservation;

(iv) Statistics and economic studies in the field of agriculture and food, including the study of the relation of agriculture to world economy;

(v) Education and extension work in the field of food and agriculture;

(vi) Agricultural credit;

(vii) Problems of agricultural population and farm labor;

7. That the Interim Commission further consider the desirability of assigning to the permanent organization functions in the field of:

- (a) Development of agricultural resources and orientation of production, where necessary;
- (b) Agricultural commodity arrangements;
- (c) Agricultural cooperative movements;
- (d) Land tenure;
- (e) Other subjects on which recommendations have been made by the Conference;

8. That the Interim Commission also consider the initiation of preliminary statistical investigations and research into the problems with which the permanent organization will deal;

9. That the Interim Commission be deemed to have been dissolved when the permanent organization has been established;

10. That the Government of the United States of America be invited to take whatever preliminary action may be necessary for the establishment of the Interim Commission after the United Nations Conference on Food and Agriculture has completed its work.

III. IMPROVEMENT OF NATIONAL DIETS

The United Nations Conference on Food and Agriculture

Having reviewed the information submitted by the several delegations on consumption deficiencies and the relation of food to health throughout the world and being deeply impressed by the dominant role played by adequate food in the reduction of sickness and death rates and the maintenance of health,

DECLARES:

1. That the first essential of a decent standard of living is the provision to all men of those primary necessities which are required to promote freedom from disease, and for the attainment of good health;

2. That the most fundamental of these necessities is adequate food which should be placed within the reach of all men in all lands within the shortest possible time;

3. That ample evidence has been presented revealing the existence of malnutrition in every country, with its inevitable consequences of preventable ill health; and

RECOMMENDS:

1. That the governments and authorities here represented:

(a) Immediately undertake¹ the task of increasing the food resources and improving the diets of their people in accordance with the principles and objectives outlined in the findings of the Conference, and declare to their respective peoples and to other governments and authorities here represented their intention of so doing;

¹ Obviously this is impossible for governments whose territory is entirely or partly occupied by enemy forces.

(b) Undertake periodically to report to one another through the permanent organization recommended in Resolution II on the state of their national nutrition and on the steps being taken for its improvement:

VI. DIETS OF VULNERABLE GROUPS

WHEREAS:

1. There are special needs of vulnerable groups, such as pregnant and nursing women, infants, pre-school and school children, adolescents, workers, and individuals receiving low incomes;
2. Families with numerous children in low-income groups are particularly vulnerable;
3. Social, economic, and health measures of various kinds are or should be provided for these groups;
4. Wide experience has shown that direct measures to supplement inadequate diets have been economical and fruitful;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

That the several governments and authorities here represented undertake positive measures for the improvement of the diets of the vulnerable groups enumerated above.

V. MALNUTRITION AND DISEASE

WHEREAS:

1. Malnutrition is responsible for widespread impairment of human efficiency and for an enormous amount of ill health and disease, reduces the resistance of the body to tuberculosis, and enhances the general incidence and severity of familiar diseases;
2. Mortality rates in infants, children, and mothers are higher in ill-fed than in well-fed populations;
3. Food consumption at a level merely sufficient to prevent malnutrition is not enough to promote health and well-being;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented:
 - (a) Initiate or continue the study of the relationship between malnutrition and impaired bodily health and vigor; and, in particular, investigate the role of inadequate food consumption in the causation of, and mortality from, all those diseases which constitute their most serious health problems;
 - (b) Direct their attention to the study of health and well-being and of the nutritional and related factors which are necessary to secure and maintain them;

(c) Consider the most effective means of disseminating knowledge of correct feeding among all sections of the population.

VI. DEFICIENCY DISEASES

WHEREAS:

1. The progressive improvement of diets will result in better health and eventually in the elimination of specific deficiency diseases, and a great deal of unnecessary suffering could be avoided if an immediate and concerted attack were made upon them;

2. Progress in our knowledge of nutrition makes it possible to seek out, treat successfully, and prevent the recurrence of the common diseases resulting from specific deficiencies in the diet;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the several governments and authorities here represented undertake immediately:

(a) To ascertain the prevalence of specific deficiency diseases among their respective peoples;

(b) To deal with them by suitable dietary and therapeutic measures;

(c) To take appropriate steps to prevent their recurrence.

VII. NATIONAL NUTRITION ORGANIZATION

WHEREAS:

1. A sound food and nutrition policy must be adopted by each government if national diets are to be progressively improved, specific deficiency diseases eliminated, and good health achieved;

2. Such a policy requires the guidance of a central authority with special competence and responsibility to interpret the science of nutrition in the light of national conditions and to propose to the appropriate authorities practical means for extending its benefits to all sections of society;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented:

(a) Undertake to establish national nutrition organizations, if such do not now exist, entrusted with the responsibility of ascertaining food-consumption habits and the nutritional status of different sections of the population; such organizations to be composed of authorities in health, nutrition, economics, and agriculture, together with administrators and consumers' representatives, etc.; to be provided with adequate funds and facilities for the efficient conduct of their work; and to have the authority to bring their recommendations to the attention of the public and to those agencies of gov-

ernment which deal with agriculture and the framing of economic and social policy;

(b) Re-examine and, if necessary, reorganize existing agencies and review legislation concerned with health, agriculture, and nutrition to the end that food and nutrition policies may be efficiently carried out.

VIII. EXCHANGE OF INFORMATION AND EXPERIENCE

WHEREAS:

1. Experience has shown that national nutrition organizations receive considerable benefit from periodic exchanges of views and information on methods employed, obstacles encountered, and progress achieved;

2. Governments participating in a common undertaking will wish to collaborate so that levels of food consumption may become more equitable not only among the different sections of the population in a given country but among the several nations of the world as well;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the several national nutrition organizations exchange information and experience and provide mutual assistance, both directly, when desirable, and through the permanent organization recommended in Resolution II, to which they should submit periodic reports on the results of their investigations into national dietary habits and nutritional status, and on the progress achieved in raising the level of food consumption throughout the population;

2. That representatives of the several national nutrition organizations meet regularly under the auspices of the permanent organization to exchange views and to make proposals for any national and international action necessary to facilitate the progress of their work.

IX. DIETARY STANDARDS

WHEREAS:

1. It is essential that there be some measure of the extent to which food supplies should be increased, and of the character and extent of the dietary improvements which need to be carried out;

2. This measure is best provided by dietary standards or allowances based upon scientific evidence;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

That the governments and authorities here represented adopt as the ultimate goal of their food and nutrition policy, dietary standards or allowances based upon scientific assessment of the amount and quality of food, in terms of nutrients, which promote health, and distinguish clearly between these standards and the more immediate consumption goals which neces-

products which are required by other nations during the war, and at the same time to produce sufficient quantities of products for home consumption, subject to the requirements of the war effort;

5. That every effort should be made now and immediately after the war by countries in a position to do so, to expand the production of farm machinery and implements, fertilizers, and other materials, including improved seeds, vital to the expansion of food production, and to cooperate in making these materials available to the agricultural producing countries, so far as the exigencies of the war permit.

XIII. COORDINATION IN THE SHORT-TERM PERIOD

WHEREAS:

1. It is the consensus of the Conference that, despite all efforts to increase production, supplies of essential foodstuffs and certain other agricultural and marine products and of the necessary instruments of production, such as fertilizers and machinery, and the means of international transportation will all be inadequate to meet basic requirements in the transition period, which may extend for several years after the cessation of hostilities;

2. It is essential for the preservation of life to secure, through equitable distribution, the maximum advantage from such supplies as may be made available;

3. It is in the interest of producers and consumers alike to avoid social and economic ills due to monopolistic practices or to violent fluctuations arising from unrestrained competition for inadequate supplies, in the prices of food, the instruments of production, and other necessities, including industrial goods;

4. It is in the common interest of all that agricultural production be soundly reestablished and expanded with all possible speed in countries now temporarily occupied by the enemy as soon as they have been liberated;

5. These objectives can be achieved only by the concerted action of governments in the stimulation of production and in the allocation of supplies;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented, for so long after the war as shortages continue, affirm the principle of mutual responsibility and coordinated action for:

(a) The increased production of necessary foodstuffs and other essential agricultural and marine products by all possible means, subject only to the exigencies of war, in each country where such expansion can be accomplished economically, either now or in the future;

(b) The transportation, distribution, and utilization of such products;

(c) The prevention of speculative and violent fluctuations in the prices of food, the instruments of production, and other necessities, including indus-

trial goods, under the conditions of scarcity that appear certain to prevail after the war;

(d) The post-war readjustment of agriculture to achieve a progressive and balanced expansion of production and consumption throughout the world;

2. That these governments and authorities take, individually and in concert, whether by conference or otherwise, all necessary measures, both domestic and international, to secure the application of this principle and the achievement of these objectives.

XIV. ADJUSTMENT OF PRODUCTION IN THE TRANSITION FROM THE SHORT-TERM TO THE LONG-TERM PERIOD

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That countries whose agriculture has been impaired should progressively modify their short-term allocation of resources to conform more closely to the long-term plan aimed at better nutrition and greater efficiency in production (for instance, in certain parts of Europe this might mean increasing the production of milk products as herds can be reestablished, accompanied by declining production of grains);

2. That countries which will have been producing during the short-term period more than normal output because of freedom from enemy action in the war or which have undertaken new lines of production, should progressively adjust the allocation of agricultural resources to conform to a long-term coordinated production plan for the best use of these resources on a world scale, based on better diets for their own people and on the international demand for nutritionally better food.

XV. LONG-TERM PRODUCTION POLICY

WHEREAS:

1. It is recognized that a secure, adequate, and suitable supply of food should be a cardinal aim in every country;

2. It is recognized that this can be achieved only as part of a world-wide policy of industrial and agricultural expansion;

3. It is recognized that in order to secure this result producers should receive a fair return for their products;

4. In order to attain the highest nutritional standards, a progressive expansion and, where necessary, reorientation in agriculture will be required;

5. It is desirable to formulate a body of principles which are applicable to agricultural policy in appropriate form in all countries;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. (a) That the inherent natural and economic advantages of any area

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That every endeavor be made to ensure an adequate supply of credit to agriculture;
2. That to this end full use be made of all types of suitable private, cooperative, and public credit institutions;
3. That the rate of interest be as low as possible and the conditions regarding initial cost, redemption, etc., be as favorable as possible for the borrowers, particularly with a view to helping the small farmer;
4. That, in view of the importance of agricultural credit, its requirements be duly recognized by international action taken as a result of this Conference.

XVII. COOPERATIVE MOVEMENTS

WHEREAS:

1. The cooperative movement has been of very great importance in many countries, both to urban and rural populations, especially in agricultural districts where farming is based on small units and in urban areas of low-income families;
2. The proper functioning of cooperative societies may facilitate adjustments of agricultural production and distribution, as members have confidence in the recommendations and guidance of their own cooperative organizations, which they know operate in the interest of their members and of society in general;
3. The democratic control and educational programs, which are features of the cooperative movement, can play a vital part in the training of good democratic citizens, and assist in inducing a sound conception of economic matters;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That, in order to make it possible for people to help themselves in lowering costs of production and costs of distribution and marketing:
 - (a) All countries study the possibilities of the further establishment of producer and consumer cooperative societies in order to render necessary production, marketing, purchasing, finance, and other services;
 - (b) Each nation examines its laws, regulations, and institutions to determine if legal or institutional obstacles to cooperative development exist, in order to make desirable adjustments;
 - (c) Full information as to the present development of cooperatives in different countries be made available through the permanent organization recommended in Resolution II.

XVIII. LAND TENURE AND FARM LABOR

WHEREAS:

Agricultural productivity and efficiency and the well-being of the tiller of the soil depend largely upon the system of land tenure and conditions of farm labor;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That each nation make a careful survey of existing systems of land tenure and the other conditions of agriculture within its boundaries to ascertain whether changes in these systems and conditions are necessary or desirable to promote the productivity and efficiency of agriculture and the welfare of its workers and that special attention be given to the position of the agricultural worker as compared with that of the worker in other industries;

2. That the permanent organization recommended in Resolution II give every assistance in this study.

XIX. EDUCATION AND RESEARCH

WHEREAS:

1. Through the inadequacy of agricultural education, existing knowledge is being very imperfectly applied to agricultural production;

2. Man's increasing demands upon the soil can be met only by the increase of knowledge;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That each nation adopt, and carry out as rapidly as conditions may permit, a policy for:

(a) Strengthening and expanding the educational system of its rural areas;

(b) Training scientific workers and rural leaders for service in agriculture;

(c) Establishing or developing systems of rural adult education (extension systems) designed to promote technical efficiency among producers, to develop understanding of rural problems, and to enrich rural life;

2. That each nation adopt a policy of promoting research in all the branches of science, including economics, which relate to food and agriculture, and to this end cooperate actively with other nations by the exchange of knowledge, materials, and personnel; and that, in particular, each nation agree:

(a) To promote research in the natural sciences and their application to problems of food and agriculture;

(b) To develop economic and sociological investigation of rural problems;

(c) To collaborate with other nations in the collecting and assembling of factual information and statistics of food and agriculture throughout the world;

3. That, as a necessary step in securing effective action in these directions, the permanent organization recommended in Resolution II be charged with the functions:

(a) Of providing advice, and technical and other assistance, to governments desiring this in connection with the establishment or improvement of agricultural research and education;

(b) Of facilitating international help and exchange in the supply of information, services, material, and personnel;

(c) Of assisting in the planning and conduct of any research programs upon which international collaboration has been agreed or desired;

(d) Of acting as a central agency for assembling, analyzing, and disseminating factual data on world agriculture;

(e) Of assisting in a comprehensive abstracting service covering the whole range of agricultural research;

(f) Of assisting scientific societies in the arrangement of international meetings.

XX. CONSERVING LAND AND WATER RESOURCES

WHEREAS:

1. Soil erosion has in the past destroyed or severely limited the utility of vast areas of land and will in the future, unless checked, constitute the greatest physical danger to the world's food production;

2. Failure to conserve and control water supplies and to use them efficiently has, in many areas, precluded important potential increase in food production;

3. To meet the food needs of the growing world population and to ensure high nutritional standards, all land in agricultural use or suitable for being brought into agricultural use should be adequately protected from erosion and from any other serious damage by various measures, including structural work and the insurance of satisfactory agricultural systems and husbandry practices;

4. The conserving of land and water resources should be regarded as an obligation of governments as well as individuals;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That each nation undertake:

(a) To survey its land and water resources with the object of ascertaining:

(i) The extent and causes of soil erosion and water losses;

(11) The soil and moisture conservation requirements of the areas covered and the types of conservation measures most needed;

(b) To develop soil and water conservation programs based on the findings of such surveys;

(c) To assist farmers in conserving and rebuilding the fertility of the soil;

2. That the necessary implementation of these policies be effected through appropriate economic and other measures such as:

(a) Assisting individual producers in planning and carrying out crop rotations, crop sequences, and other suitable practices;

(b) Protection of forest and afforestation of unprotected watersheds where necessary, including measures for the protection of food-producing wild life, to prevent flood damage and to conserve water needed for direct human consumption and for irrigation;

(c) Building, or assisting in building, dams, terraces, and other structures to minimize the loss of soil fertility through erosion caused by wind or water;

(d) Making readily available to individual producers soil amendments, particularly phosphates and lime, that will make possible expanded production of leguminous and other soil-building crops;

(e) Development and employment of farming systems and husbandry practices which ensure soil conservation;

(f) Developing a program of research designed to determine the best methods and practices for bringing about conservation of land and water resources under various conditions;

(g) Developing a program of education to inform the public generally of the importance and need of conservation and to help producers to understand and put into practice better farming methods;

3. That the permanent organization recommended in Resolution II provide assistance by such means as:

(a) Formulation of a body of principles for the conduct of soil-conservation work;

(b) Collection and interchange between nations of data and information on erosion, erosion-control methods, and other pertinent matters;

(c) Interchange between nations of personnel technically trained in the development of conservation research and in the application of its findings.

XXI. DEVELOPMENT AND SETTLEMENT OF LAND FOR FOOD PRODUCTION

WHEREAS:

1. If freedom from want is to be achieved throughout the world by full development of food-producing resources, conservation of existing lands and the development of new areas must be given primary consideration;

2. There are large areas of land capable of materially adding to the world's food supply which can be opened to food production if transportation facili-

ties were made available and insanitary conditions and other deterrents corrected;

3. There are many areas of great extent not now producing or in a low state of production because of lack of water-conserving and storing facilities for irrigation, lack of drainage, frequent flooding by rivers, wastage by erosion, deficiencies of plant food, accumulation of alkali, or improper development;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That each nation undertake:

(a) To survey its land and water resources to determine (1) in what areas, if opened to settlement, production of food could materially be increased; (2) what areas, if supplied with additional production facilities, such as water supply for irrigation, improved drainage, or by the correction of deterrents to production, could materially increase their production of food; (3) the kind, extent, and economic possibility of developments necessary for this increase in food production;

(b) To develop on the basis of these findings policies of settlement and development of a program applicable to the economic, social, agricultural, and geographical needs of the nation of which it is a part, considering:

(i) Physical conditions including (1) soils and climate, (2) health conditions, (3) transportation, and (4) clearing, irrigation, or drainage needs;

(ii) Settlement policies, including (1) the type of farming systems to be established, (2) the scale of working by plantations, small holdings, or cooperative organization of areas for production, (3) measures to prevent speculation and exploitation, and (4) financial and other assistance;

(iii) Conservation measures for sustained production of the area, including (1) agronomic and management practices, (2) conservation structures and practices, (3) protection against alkali accumulations, and (4) measures of forest conservation and reforestation;

2. That the necessary implementation of these policies and programs be given through appropriate measures applicable to conditions and needs of each region or area, including:

(a) A comprehensive engineering service providing for developments affecting the entire area, such as transportation, improvement of sanitary conditions, water-storage reservoirs, drainage channels, and flood protection;

(b) Development of a program of sound land use, including conservation measures;

(c) Provision for technical assistance to individual producers in planning and developing the areas under their supervision;

(d) Provision for financial assistance to settlers for further development and operation;

(e) Provision for marketing produce, including necessary processing and preservation;

3. That the permanent organization recommended in Resolution II provide assistance by such means as:

(a) The interchange between nations of pertinent data and information on erosion and methods of control, land improvements, etc.;

(b) The interchange between nations of technically trained personnel to assist in the development of conservation research, etc.

XXII. OCCUPATIONAL ADJUSTMENTS IN RURAL POPULATIONS

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That, in order to effect the necessary occupational adjustments in agricultural populations:

(a) Agricultural efficiency should be improved and new lands brought under cultivation wherever possible;

(b) Areas which have a large agricultural population in relation to their agricultural resources should:

(i) Develop industries suitable to the area, particularly for the processing and preserving of the agricultural produce of the country, and, where feasible, for the manufacture of machinery, fertilizer, and equipment needed for agriculture;

(ii) Be encouraged, wherever it is economically sound, to export processed articles instead of the raw product, and in particular to take advantage of any reductions of trade barriers in the importing countries;

(iii) Be assisted in securing capital for the development of industrial and transportation facilities and for the development of export outlets for processed products;

(iv) Be assisted in securing facilities for the importation of machinery and tools where such are necessary;

(v) Be assisted in securing and training technical personnel;

(vi) Undertake programs of public works and, where necessary, be assisted in securing technical advice and access to capital;

(vii) Develop sources of employment in public and private services;

(c) Where agricultural settlements are possible, appropriate steps should be taken to facilitate the movement of people from overmanned agricultural areas;

(d) In order to help in intra-national and international migration where these are feasible:

(i) Occupational training should be provided;

(ii) Labor bureaus should be set up where necessary;

(iii) Transportation, communication, housing, sanitation, health, and other public facilities necessary to effective settlement should be provided by the country receiving the migrants;

(iv) Steps should be taken to provide for the economic security of the migrants;

(e) Where emigration is possible, an international organization should support arrangements to provide adequate safeguards for the settlers and for the countries concerned, and to facilitate the movement through other appropriate means.

XXIII. INTERNATIONAL SECURITY

WHEREAS:

1. Freedom from want cannot be achieved without freedom from fear;
2. Policies of aggression and the fear of aggression have induced the uneconomic employment of human and material resources, the development of uneconomic industries, the imposition of barriers to international trade, the introduction of discriminatory trade practices, and the expenditure of huge sums on armaments;
3. These obstructions to a progressively expanding economy cannot be removed without effective collaboration among nations;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented, by virtue of their determination to achieve freedom from want for all people in all lands, affirm the principle of mutual responsibility and coordinated action to establish such conditions of international security as will make possible an expanding and balanced world economy;
2. That these governments and authorities take in concert all necessary measures to secure the application of this principle and the achievement of this objective.

XXIV. ACHIEVEMENT OF AN ECONOMY OF ABUNDANCE

WHEREAS:

1. The first cause of hunger and malnutrition is poverty.
2. The promotion of the full employment of human and material resources, based on sound social and economic policies, is the first condition of a general and progressive increase in production and purchasing power;
3. The sound expansion of industry in undeveloped and other areas, with equality of access to materials and markets, serves also to expand production and purchasing power and is therefore indispensable to any comprehensive program for the advancement of agriculture;
4. Tariffs and other barriers to international trade, and abnormal fluctuations in exchange rates, restrict the production, distribution, and consumption of foodstuffs and other commodities;
5. Progress by individual nations toward a higher standard of living con-

tributes to the solution of broader economic problems, but freedom from want cannot be achieved without effective collaboration among nations;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented, by virtue of their determination to achieve freedom from want for all people in all lands, affirm the principle of mutual responsibility and coordinated action:

(a) To promote the full and most advantageous employment of their own and all other people and a general advance in standards of living, thereby providing for an increase in both production and purchasing power;

(b) To promote the uninterrupted development and most advantageous use of agricultural and other material resources for the establishment of an equitable balance between agriculture and industry in the interest of all;

(c) To secure for agriculture the stimulus of additional purchasing power through the sound development of industry;

(d) To assist in the achievement of these ends by all appropriate means, including the supply of capital, equipment, and technical skill;

(e) To maintain an equilibrium in balances of payments, and to achieve the orderly management of currencies and exchange;

(f) To improve the methods and reduce the cost of distribution in international trade;

(g) As an integral part of this program, to reduce barriers of every kind to international trade and to eliminate all forms of discriminatory restrictions thereon, including inequitable policies in international transportation, as effectively and as rapidly as possible;

2. That these governments and authorities take, individually and in concert, whether by conference or otherwise, all necessary measures, both domestic and international, to secure the application of this principle and the achievement of these objectives.

XXV. INTERNATIONAL COMMODITY ARRANGEMENTS

WHEREAS:

1. Excessive short-term movements in the prices of food and agricultural commodities are an obstacle to the orderly conduct to their production and distribution;

2. Extreme fluctuations of the prices of food and agricultural products aggravate general deflationary and inflationary tendencies, which are injurious to producers and consumers alike;

3. The mitigation of these influences would promote the objectives of an expansionist policy;

4. Changes in the scale and character of production to meet more effectively the world's need for food and agricultural products may in certain

instances require a period of transition and international cooperation to aid producers in making necessary readjustments in their productive organization;

5. International commodity arrangements may play a useful part in the advancement of these ends but further study is necessary to establish the precise forms which these arrangements should take and whether and to what extent regulation of production may be needed;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That international commodity arrangements should be designed so as to promote the expansion of an orderly world economy;

2. That, to this end, a body of broad principles should, through further international discussion, be agreed upon regarding the formulation, the provisions, and the administration of such international commodity arrangements as may be deemed feasible and desirable and should include assurance that:

(a) Such arrangements will include effective representation of consumers as well as producers;

(b) Increasing opportunities will be afforded for supplying consumption needs from the most efficient sources of production at prices fair to both consumers and producers and with due regard to such transitional adjustments in production as may be required to prevent serious economic and social dislocations;

(c) Adequate reserves will be maintained to meet all consumption needs;

(d) Provision will be made, when applicable, for the orderly disposal of surpluses;

3. That international organization should be created at an early date to study the feasibility and desirability of such arrangements with reference to individual commodities and, in appropriate cases, to initiate or review such arrangements to be entered into between governments, and to guide and coordinate the operations of such arrangements in accordance with agreed principles, maintaining close relations with such programs as may be undertaken in other fields of international economic activity to the end that the objective of raising consumption levels of all peoples may be most effectively served.

XXVI. SPECIAL NATIONAL MEASURES FOR WIDER FOOD DISTRIBUTION

WHEREAS:

1. Even in the most prosperous countries there are many families which cannot afford to buy enough good food;

2. In some countries, and at some times, hunger and semistarvation have been widespread;

3. This situation has existed even when agricultural prices have been low and when large supplies of food have piled up in warehouses or rotted in the

fields, and the problem will not be fully met by general economic measures to stimulate production and trade;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented accept the responsibility of making it possible, so far as it is within their power, for each person in their respective countries who is without an adequate diet, to improve his diet in the direction of obtaining the physiological requirements of health, adopting such of the following, or other, measures as are designed to fit local conditions and institutions:

(a) Adequate social-security measures, such as family allowances, social insurance, and minimum wages;

(b) Some form of direct action to make protective foods available free, or at low prices, to groups with inadequate diets;

(c) Special attention to assisting such groups as pregnant women, nursing mothers, infants, children, aged persons, invalids, and low-paid persons;

2. That the diets provided under these programs be based upon the best scientific information on nutritional needs;

3. That food-distribution measures be coordinated with programs to increase food production and to bring about adjustments in agriculture and fishing which will, on the one hand, encourage the production and distribution of those foods most lacking in the diets of the country, and adapted to the soils and climates; and will, on the other hand, provide an adequate level of living to persons engaged in farming and fishing;

4. That the permanent organization recommended in Resolution II assist the several governments and authorities in making surveys of nutritional needs, in helping develop new food-distribution programs, in disseminating information concerning those programs, and in aiding to coordinate efforts in this field.

XXVII. SPECIAL INTERNATIONAL MEASURES FOR WIDER FOOD DISTRIBUTION

WHEREAS:

1. The provision of adequate food for all the people in each nation is primarily the responsibility of the nation concerned and that this responsibility will be met primarily by national measures;

2. Nevertheless, undernutrition may continue for long periods of time in certain countries, while they are developing their agriculture and industry, and before they are able to produce internally or acquire abroad adequate amounts of food to meet the needs of their people;

3. It is generally agreed that it would be desirable if arrangements could be made whereby a part of current world food supplies could be used to supplement the national food-distribution programs of certain countries;

4. Moreover, relatively little attention has been given in the past to the possibilities of developing special measures for wider food distribution in the international field;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the permanent organization recommended in Resolution II study the possibility of devising measures to meet the needs of countries with inadequate supplies, and the machinery needed for this purpose, distinguishing between methods which would be used in the case of famines following catastrophes, and in the case of countries where the available food supplies are generally inadequate;

2. That the problems of developing special international measures for wider food distribution in the latter case be studied in connection with plans in the countries concerned for the long-term development of the national resources, and for raising the technical skill and the level of living of their workers, and that the above-mentioned permanent organization collaborate with the International Labor Office on this question.

XXVIII. GOVERNMENT AND OTHER NATIONAL
SERVICES IN MARKETING

WHEREAS:

Improvements in the marketing of foods and other products of agricultural or marine origin are largely dependent upon certain basic government services, including the provision of quality standards, an efficient grading and inspection service, marketing research and education designed to promote improved marketing practices, and protection of the public, through the medium of pure-food laws, against impurities or adulterations and against unfair competition and undesirable trade practices;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the permanent organization recommended in Resolution II:

(a) Investigate the practicability, and, if practicable, assist in the adoption of international grade standards for agricultural and marine commodities and of providing machinery for controlling the use of any such international grade standards in international trade;¹

(b) Give assistance to governments and other national organizations looking to the establishment in each country of adequate grade standards and technical advisory and inspection services covering appropriate prod-

¹ The use of any such standards should be voluntary on the part of individual countries and, if used, any one grade should apply uniformly throughout the world.

ucts, and, if requested, advise in the promotion of the educative, administrative, and legislative action necessary to achieve this objective;²

(c) Promote standardization of containers, both nationally and internationally, along the lines suggested in connection with grades;³

(d) Assist governments to extend and improve standards of nutrient content and purity of all important foods, consider also the formulation and adoption of similar international standards to facilitate and protect the interchange of such products between countries, and agree upon international methods of determination;⁴

(e) Consider the formulation and adoption of international standards or minimum requirements for drugs, insecticides, fungicides, fertilizers, and other materials used by agricultural producers, in order to prevent misrepresentation in their preparation and sale, and to promote the purchase of products best suited to particular uses;⁵

(f) Consider whether existing international market news services adequately supply and coordinate information and statistics on prices and supply and demand; and promote any improvements considered necessary;⁶

(g) Urge upon governments the necessity, in the interests of better nutrition and better living, for further research into:

(i) Consumer needs, including palatability, packaging, food habits, shopping habits, shopping facilities, etc.;

² The primary purpose of grade standards is to improve the quality and permit the purchase and sale of commodities by description rather than by inspection of each lot by buyers and sellers. Such standards (1) supply the basis for a common language for describing the product marketed; (2) facilitate trading by minimizing misunderstandings concerning the quality of the products; (3) reduce losses from rejections and costs of arbitration; (4) facilitate price quotations and other market information on the basis of quality; (5) reduce or eliminate the costs of resampling or inspection in various stages of marketing; (6) improve the collateral value of warehouse receipts and thus reduce financing costs; (7) help buyers to obtain the qualities of products they need; (8) permit the distribution of the various qualities on the basis of their most advantageous outlets; and (9) facilitate payments to producers on the basis of quality, which in turn would encourage adjustments in the qualities produced on the basis of consumer demand.

³ Standardization of containers has not developed to the same extent as has standardization of grades. Lack of standardization gives rise to waste and confusion in the distribution of food.

⁴ In order to protect health and improve nutrition, minimum standards for the nutrient content, and in certain cases for the methods of preparation and for the artificial enrichment of staple foods, should be prescribed by governments. These steps should be taken in addition to any measures designed to secure the absence of toxic substances and organisms from food under the usual type of pure-food laws. International standards of labeling and packaging can help, but in general the most effective action can be taken by individual countries themselves.

⁵ In some countries little has been done to protect agriculturists from exploitation in the purchase of materials used in agricultural production.

⁶ International machinery is desirable for the dissemination of such information and for the promotion of action by governments to make available comprehensive market data.

(II) Improved methods, with particular reference to perishable protective foods and any commodities of which buffer or other stocks may be held, of processing, preservation, storage, packaging, and transport;

(III) Economics of marketing, including processing and retail distribution, consumer needs, and ways in which the shopkeeper, trader, and farmer can be helped to meet these needs;

(IV) The relation of food production on the farm to market demand and nutritional requirements; and engage in the dissemination of the information so obtained, and urge on governments the need for education of the producer, the intermediary, and the consumer in the principles of good marketing, and in marketing technique, including processing and storage;

2. That the governments and authorities here represented take steps to ensure that producers and consumers are adequately protected against trade malpractices and against exploitation in the purchase and sale of food and other products of agricultural or marine origin, and commend general and specific measures to prevent confusion as to quality and country of origin; and that the permanent organization above-mentioned assist, if requested, governments and authorities to this end, and, if appropriate, formulate international codes of trade practices.⁷

XXIX. ADDITIONS TO AND IMPROVEMENTS IN MARKETING FACILITIES

WHEREAS:

1. Many countries are lacking in adequate facilities for the preservation of essential foods for consumption throughout the year, and for the production, transport, and distribution of these foods to satisfy nutritional needs;

2. The destruction and disorganization of marketing facilities resulting from the war will make this problem particularly acute in countries which are the victims of hostilities;

3. Technological developments in food preservation, processing, and transport have been accelerated by the war and give promise of contributing materially to the solution of these problems;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented take steps to secure the provision of adequate processing, transportation, and distribution facilities required for improving the nutritional levels of their populations; and that the permanent organization recommended in Resolution II study the technical, scientific, and economic factors involved, with particular reference to developments during the war, arrange for the pooling of knowl-

⁷ There is general approval in all countries of legislative and regulatory measures designed to protect both consumers and producers from exploitation arising from unfair trade practices, but some governments have been slow to act in such cases.

edge thus acquired, and give all possible assistance to the governments and authorities in realizing these objectives;⁸

2. That steps be taken by each country to achieve full utilization of important new technological developments in food preservation, transportation, and marketing, including especially dehydration, freezing, and ocean and air transportation;⁹

3. That the permanent organization above-mentioned take steps to obtain, collate, and disseminate information regarding conditions of marketing, processing, and storage facilities in all countries, including those devastated by war, with particular reference to any increased facilities needed and to the rehabilitation of countries devastated by war, in order to promote the expansion of marketing facilities in a carefully planned rather than a haphazard manner;¹⁰

4. That governments examine transport deficiencies, both internally and in connection with export and import trade, which may be hindering the development of adequate and efficient marketing of foodstuffs and other agricultural and marine products and take such steps as may be necessary to rectify deficiencies; and that any international body concerned with international transport assist to this end.¹¹

⁸ The methods of attaining these objectives will vary in different countries in accordance with circumstances and may include action by governments to establish in each country central organizations responsible for the work of carrying out these objectives by means of appropriate legislation designed to assist the production, processing, and distribution of the products of their economy, using the most up-to-date technological methods adapted to the conditions peculiar to each country. Among the objectives of this action are better utilization of foods not consumed in fresh form, the avoidance of loss of the nutritive value of perishable foods, the prevention of waste, and the stabilization of marketing conditions to induce so far as possible an adequate and even flow of foods to consumers. Special attention should be given to the establishment of local markets, which must be built up hand in hand with increased local production of protective foods to ensure the commercial success of both production and marketing.

⁹ The war has speeded up the development of new methods of preserving perishable foods, and of facilities for ocean and air-cargo transportation, which will have very important effects upon post-war national and international trade in foodstuffs. Many countries by means of air transport will be able to draw upon much wider areas of production for their supplies of the protective foods in concentrated form, and to transport and distribute such foods to presently inaccessible areas and among sectors of the national populations now having inadequate diets.

¹⁰ Much rebuilding and readjustment of plants and personnel required for the marketing of foodstuffs will be necessary after the war. This offers an opportunity not only to meet quickly the immediate post-war needs, but also to build a marketing system adapted to modern needs, with particular reference to the attainment of increased consumption of essential foods. This will require foresight, planning, and action designed to forestall haphazard reconstruction based on temporary expediency rather than long-term efficiency and adequacy.

¹¹ Transportation charges frequently absorb a large or even a prohibitive part of the price of products, and ocean shipping or internal transportation charges may be so high as to prevent the interchange of products which is necessary if consumers are to be adequately

XXX. INCREASING THE EFFICIENCY AND REDUCING THE COST OF MARKETING

WHEREAS:

1. The maintenance of food consumption among the peoples of the world at levels sufficiently high to satisfy minimum health requirements calls for the provision of greater quantities of better food at reasonable prices;
2. Except in some countries where consumers largely produce their own food supplies, a substantial part of the total cost of food to the consumer consists of marketing costs (including the costs of assembly, grading, inland and sea transport, storage, wholesale and retail distribution), processing costs, and the rewards of enterprise;
3. In some countries, the provision of unessential services increases the margin between the producer and consumer;
4. Reduction in marketing costs and margins can benefit both producer and consumer alike;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

1. That the governments and authorities here represented take all practicable steps to reduce marketing, processing, storage and distribution costs, and margins between producers and consumers, particularly by the elimination of unessential services not required by producers or by low-income consumers.¹²
2. That the permanent organization recommended in Resolution II collect and disseminate information on marketing costs and margins in different countries and in international trade, on the factors which determine or influence such costs and margins, and on the steps taken by governments, by cooperative associations, and by private enterprise to reduce them.¹³

supplied. The provision of transportation and storage services under present arrangements awaits the development of adequate volume of production, yet this volume cannot be built up without the transportation and other services necessary to encourage it. These difficulties cannot be solved by individual or private initiative alone; and governments should assume the responsibility by adequate action to overcome them.

¹² Most of the links in the chain from producer to consumer are essential but there is a tendency for extravagant services to develop. There is considerable scope for reduction of marketing costs by the elimination of unessential services, including unnecessary transport. Attention should also be directed to the possibilities of reducing marketing, processing, and distribution costs by:

- (a) Assisting merchants in the adoption of more efficient methods of operation;
- (b) Effecting such reorganization of marketing channels as may reduce to a minimum the number of steps involved in taking the products from the farms to consumers;
- (c) Regulating the charges of transportation agencies or other factors in marketing if such charges are not kept at reasonable levels by competition;
- (d) Assisting in establishing or financing on a sound commercial basis of new and more efficient processing, storage, and transportation facilities.

¹³ Although each country will seek to improve the efficiency of marketing in conformity with its economic and agricultural circumstances, there is a need for some international

XXXI. FISH AND MARINE PRODUCTS

WHEREAS:

1. Fish, marine animals, and marine products are essential in high degree to the diet of the people of many countries and play an important role in the nutrition of other countries;

2. The production of fish and marine products is vital to the economy of certain countries, and the adequate livelihood of the fisherman, like that of the farmer, depends upon a balanced world economy;

3. Consideration of questions relating to fish and marine products is important in any program designed to meet immediate and long-term food and other requirements;

The United Nations Conference on Food and Agriculture

RECOMMENDS:

That the general conclusions reached by this Conference apply, wherever appropriate, to fish and marine products, and that these subjects be considered by the permanent organization recommended in Resolution II.

XXXII. RESOLUTION OF APPRECIATION TO THE PRESIDENT
OF THE UNITED STATES OF AMERICA

The United Nations Conference on Food and Agriculture expresses its gratitude to the President of the United States of America, Franklin Delano Roosevelt, for his initiative in convening the present Conference, for its preparation, and for his contribution to its success. This resolution is to be embodied in the Final Act of the Conference.

XXXIII. APPRECIATION TO THE OFFICIALS OF THE CONFERENCE

WHEREAS:

1. The United Nations Conference on Food and Agriculture was able to conduct its work under conditions of exceptional efficiency;

2. This efficiency and consequent good results, in no small measure resulted from the wisdom and talents of the Chairman, the Honorable Marvin Jones, whose ideals of international solidarity were a source of inspiration and stimulus to all;

3. Without the previous and exhaustive preparation of documentary materials submitted to the Conference by the Secretariat and without its painstaking work, it would not have been possible for the Conference to attain in such a short time the results achieved;

agency which can collect, analyze, and disseminate facts and experience relating to marketing costs and margins. Such data will assist not only governments but also cooperatives and private enterprises in formulating policies aimed at reducing marketing costs and hence the margin between producer and consumer.

The United Nations Conference on Food and Agriculture

RESOLVES:

1. To express to its Chairman, the Honorable Marvin Jones, its deep appreciation for the admirable manner in which he has guided the Conference and to pay to him the tribute of its gratitude; and

2. To express to the Secretary General, to the Press Relations Officer, to the Assistant Secretary General, to the Secretariat, and to the clerical staff its appreciation for the efficiency and diligence shown in preparing the numerous documentary materials and in assisting the Conference in attaining its objectives.

IN WITNESS WHEREOF, the following delegates sign the present Final Act.

DONE at Hot Springs, Virginia, on the third day of June, nineteen hundred and forty-three, in the English language, the original to be deposited in the archives of the Department of State of the United States, and certified copies thereof to be furnished by the Government of the United States of America to each of the governments and authorities represented at the Conference.

[Signatures follow here.]

REGULATIONS RELATING TO CLAIMS BEFORE THE AMERICAN MEXICAN CLAIMS COMMISSION*

Pursuant to section 2 (c) of the Settlement of Mexican Claims Act of 1942 (56 Stat. 1058; 22 U.S.C., Sup. II, 661 (c)), the following regulations relating to claims before the American Mexican Claims Commission established pursuant to the Settlement of Mexican Claims Act of 1942 are hereby promulgated by the Commission:

Sec.

- 600.1 Notification to claimants.
- 600.2 Decisions of the Commission.
- 600.3 New claims.
- 600.4 Period for filing new claims.
- 600.5 Method of filing new claims.
- 600.6 Evidence in support of new claims.
- 600.7 Claims in which appraisals have already been made.
- 600.8 Other claims.
- 600.9 Access to records of the Commission.
- 600.10 Fees of attorneys.
- 600.11 Relation between the Commission and claimants.

AUTHORITY: §§ 600.1 to 600.11 inclusive issued under 56 Stat. 1058; 22 U.S.C., Supp. II, 661 (c).

§ 600.1 *Notification to claimants.* (a) Notification of the establishment of this Commission and of these rules and regulations shall be sent as soon as

* Promulgated by the Commission on May 18, 1943; text from *Federal Register*, May 19, 1943, p. 6535.

practicable to all persons who appear from the records of the Department of State, or from advice otherwise received by the Commission, to have claims within the purview of section 3 (a), and to all persons having claims of record with respect to which appraisals were made within the purview of section 4 (a), of the Settlement of Mexican Claims Act of 1942. Notification shall also be made through the press and in such other manner as the Commission may deem appropriate for the benefit of persons who may desire to present claims to the Commission and who have not previously brought their claims to the attention of the Government of the United States.

(b) The notification herein provided for shall be without prejudice to the subsequent determination of the rights of the persons so notified, or of other persons claiming as assignees, heirs, executors, administrators, or otherwise, with respect to the prosecution of claims before this Commission.

§ 600.2 *Decisions of the Commission.* The bases of decisions to be rendered by the Commission are prescribed by section 5 (a) of the Settlement of Mexican Claims Act of 1942.

§ 600.3 *New claims.* New claims are those comprehended by subparagraphs (1), (2), (3), and (4) of section 3 (a) of the Settlement of Mexican Claims Act of 1942.

§ 600.4 *Period for filing new claims.* Under the provisions of section 2 (d) of the Settlement of Mexican Claims Act of 1942, the Commission is required to complete its work not later than two years from April 5, 1943. It is therefore necessary that all new claims to be considered by the Commission be filed with it on or before December 1, 1943. The Commission may, in its discretion and for good cause shown, grant an extension of time for filing a new claim in any particular case. A claim shall be considered as filed on the date when it is received at the office of the Commission.

§ 600.5 *Method of filing new claims.* New claims may be filed in single copy only either by the claimant personally or by a duly authorized attorney. In the latter case, however, written authority for the attorney to act in that capacity shall accompany the claim. The statement of claim, which shall consist of a chronological narration of all pertinent matters tending to establish a valid claim, such as claimant's American nationality, nature of property interest involved, details concerning the acquisition thereof, acts of officials of the Mexican Government giving rise to the claim, nature and extent of loss or damage for which claim is made, etc., shall be verified under oath either by the claimant or by his attorney.

§ 600.6 *Evidence in support of new claims.* (a) Evidence filed in support of claims shall accompany the statement of claim and shall, wherever possible, be in the form of either original documents or properly certified copies of originals. The Commission will receive and consider all written evidence of an authentic nature presented in support of claims and will attach such weight thereto as in its judgment seems proper. Documents filed in the Spanish language should be accompanied by an authentic translation thereof.

(b) It is essential that claimants fully understand the necessity for the complete preparation and filing of claims and supporting evidence at the earliest practicable date. Time-limits for the filing of evidence in individual claims will be fixed by the Commission as the necessities of its work may require.

(c) Allegations of claimants, unsupported by other evidence, cannot be regarded as satisfactory proof of facts with respect to which such allegations are made.

(d) Fundamental requirements in the matter of evidence in support of claims include, among other things:

(1) Proof of the American nationality of all persons or concerns on whose behalf claim is made;

(2) Proof of the ownership or other interest on the part of claimants in real or personal property where loss of, injury to, or wrongful interference with such property is alleged as a basis of claim;

(3) Proof of alleged wrongful acts or omissions on the part of officials of the Mexican Government where liability is predicated upon such acts or omissions;

(4) Proof of the nature and amount of damages for which claim is made.

(e) With respect to claims comprehended by paragraph (4) of section 3 (a) of the Settlement of Mexican Claims Act of 1942, involving international responsibility of the Government of Mexico, the bases of such alleged responsibility under international law shall be clearly set forth in the statement of claim.

§ 600.7 *Claims in which appraisals have already been made.* (a) Claimants whose claims have already been appraised either by the American Commissioner designated pursuant to the protocol of April 24, 1934 (48 Stat. 1844), or by the American Commissioner appointed under the Agrarian Claims Agreement of 1938 (53 Stat. 2442) (see section 4 (a) of the Settlement of Mexican Claims Act of 1942), and to whom notices of such appraisals are sent, shall notify the Commission in writing within a period of 30 days from the date of the mailing of such notification whether the appraisal so made is accepted as final and binding, or whether it is intended to file a petition for a review of such appraisal as provided in section 4 (c) of the Settlement of Mexican Claims Act of 1942.

(b) In the event that claimant fails within the specified period to so notify the Commission, or in the event that the Commission is notified within that period of the acceptance of the appraisal, it will, at the expiration of that period, enter an award on the basis of the appraisal and certify the award to the Secretary of the Treasury.

(c) Should the claimant desire to exercise the option of filing a petition for a review by this Commission of the appraisal already made, by making known such desire as provided in § 600.7 (a), a period of 45 days from the

date the Commission receives such notice will be allowed for the filing of the petition, which must be accompanied by such written legal contentions as the claimant may desire to make in support thereof. If no petition for review is filed within the period just mentioned, or within any extension thereof which may, in the discretion of the Commission, be granted, the Commission will enter an award on the basis of the appraisal already made and certify the award to the Secretary of the Treasury.

(d) In the event the Commission decides to review a claim, it may, in its discretion, permit the filing of additional evidence in support of the claim: *Provided*, That it is established to the satisfaction of the Commission that it was impossible for the claimant or his attorney, despite the exercise of due diligence, to obtain and file such evidence within any period prescribed for such filing by or in accordance with the applicable agreements between the Government of the United States and the Government of Mexico, or by or in accordance with the applicable rules adopted pursuant to such agreements.

(e) No evidence shall be filed in support of any claim under § 600.7 (d) unless the permission of the Commission has been obtained in advance. Applications for such permission shall set forth the nature of the evidence which it is desired to file and shall be accompanied by such documentary evidence as the claimant may desire to submit in support of allegations that it was impossible for either him or his attorney, despite the exercise of due diligence, to obtain and file such evidence within any period prescribed for such filing by or in accordance with the applicable agreements between the Government of the United States and the Government of Mexico, or by or in accordance with the applicable rules adopted pursuant to such agreements.

§ 600.8 *Other claims.* Should a claimant desire to file additional evidence in support of a claim comprehended by paragraph 5 of section 3 (a) of the Settlement of Mexican Claims Act of 1942, a request for permission to file such evidence, accompanied by a statement of the nature thereof, shall be made of the Commission within a period of 30 days from the date of the mailing of the letter notifying the claimant of the action taken with respect to such claim by the American Commissioner pursuant to the protocol of April 24, 1934.

§ 600.9 *Access to records of the Commission.* Evidence in the possession of the Commission filed by claimants or their attorneys in support of individual claims, correspondence between claimants or their attorneys and this Commission or previous Commissions regarding their claims, as well as pleadings and briefs filed in support thereof, may, in the discretion of the Commission, be examined in the office of the Commission by the claimants or their duly authorized attorneys.

§ 600.10 *Fees of attorneys.* In any case decided by the Commission in connection with which either the claimant or his attorney desires that the fee of the latter for services rendered in connection with the preparation or prosecution of the claim be determined and apportioned in accordance with

the provisions of section 5 (c) of the Settlement of Mexican Claims Act of 1942, a request in writing to that effect shall be communicated to the Commission at the earliest practicable date.

§600.11 *Relation between the Commission and claimants.* Responsibility for the proper preparation of a claim and documents presented in connection therewith rests solely upon the claimant or his attorney. The functions of the Commission are judicial in nature and neither the Commission nor persons in its employ may assist claimants or their attorneys in the preparation or prosecution of claims or discuss the merits of claims with claimants or their attorneys.

EDGAR E. WITT, *Chairman.*

SAMUEL M. GOLD, *Commissioner.*

CHARLES F. McLAUGHLIN, *Commissioner.*

May 18, 1943.

INDEX

- Aggressor nations, commercial transactions with. Recommendations of Inter-American Conference on Systems of Economic Control. 14.
- Agriculture:
- Credit facilities for intensifying, recommended by United Nations Conference. June 3, 1943. 175.
 - United Nations Conference on. Final Act. June 3, 1943. 159.
- Alien Enemies. Required to carry identification certificates. United States Proclamation Regarding Alien Enemies. Jan. 14, 1942. 55.
- American-Mexican Claims Commission. Regulations relating to claims. 192.
- American Republics:
- Financial and commercial transactions among. Recommendations of Inter-American Conference on Systems of Economic Control. 16.
 - Prevention of subversive propaganda. Resolutions of Inter-American Conference of Police and Judicial Authorities. June 9, 1942. 77.
 - Reaffirmation of fundamental principles of international law, by Inter-American Juridical Committee. 21.
 - Montevideo Congress (1939-40) redefines private international law. 97.
- Argentina. Memorandum of agreement on trade in wheat. April 22, 1942. 24.
- Associations, subversive. Controls recommended by Inter-American Conference of Police and Judicial Authorities. 78.
- Asylum. For political refugees. Defined by Montevideo Treaty. Aug. 4, 1939. 100.
- Australia. Memorandum of agreement on trade in wheat. April 22, 1942. 24.
- Bankruptcy. In international law. Montevideo Treaty on International Commercial Law. March 19, 1940. 138.
- Bases. Granted to United States by Liberia. Liberia-United States Defense Agreement. March 31, 1942. 86.
- Blocked funds, of aggressor nations. Inter-American Conference on Systems of Economic Control. Recommendations. 14.
- Canada. Memorandum of agreement on trade in wheat. April 22, 1942. 24.
- China-Germany-Italy-Japan. Declaration of war by China. Dec. 12, 1941. 1.
- China-Great Britain. Treaty for relinquishment of extraterritorial rights in China. Jan. 11, 1943. 57.
- China-United States. Treaty relinquishing extraterritorial rights in China. Jan. 11, 1943. 65.
- Commercial Law. Redefined by Montevideo Treaty. March 19, 1940. 132.
- Creditors. Under international law. Civil meetings of, regulated by Montevideo Congress (1939-40). 120.
- Czechoslovakia. Exchange of Notes on British Policy toward. Aug. 5, 1942. 2.
- Domicile. Civil, of physical persons under international law. Regulated by Montevideo Congress (1939-40). 142.
- Economic Control. Inter-American Conference on. Final Act. June 30, 1942. 9.
- Export Control. Agreement on international trade in wheat. April 22, 1942. 30.
- Extradition, of criminals. Montevideo Treaty on International Penal Law. Regulations. March 19, 1940. 126.
- Extraterritoriality. China-Great Britain Treaty for relinquishment of extraterritorial rights, Jan. 11, 1943, 57; China-United States Treaty, Jan. 11, 1943, 65.

Food:

- Distribution of, to be widened by national governments. Recommendations of United Nations Conference on Food. 184.
- Improvement of national diets, recommendations for. United Nations Conference. June 3, 1943. 166.
- Interim Commission on, appointed by United Nations Conference. 164.
- Levels sufficient to prevent malnutrition recommended by United Nations Conference. 167.
- Production of, to be expanded. Recommendations of United Nations Conference. 171.
- United Nations Conference on. Final Act. June 3, 1943. 159.
- Foreign Agents. In United States. Foreign Agents Registration Act. April 29, 1942. 46.

- Great Britain. Memorandum of agreement on trade in wheat. April 22, 1942. 24.
- Great Britain-Czechoslovakia. Exchange of Notes on British Policy. Aug. 5, 1942. 2.
- Great Britain-United States:
 - Agreement on Interchange of Patent Rights. Aug. 24, 1942. 4.
 - Agreement regarding Problems of Marine Transportation and Litigation. Dec. 4, 1942. 71.

- Intellectual Property. Rights in, defined by Montevideo Congress of 1939-40. 103.
- Inter-American Conference of Police and Judicial Authorities. Final Act. June 9, 1942. 75.
- Inter-American Conference on Systems of Economic Control. Final Act. June 30, 1942. 9.
- Inter-American Juridical Committee. Reaffirmation of fundamental principles of international law. June 2, 1942. 21.
- International Wheat Council. Created by Agreement on international trade in wheat. April 22, 1942. 34.

- Labor, rural. Assistance to, recommended by United Nations Conference on Food. 191.
- Liberia-United States. Defense Agreement. March 31, 1942. 85.

- Marine Transportation. Waiver of claims, for mutual aid in war. Great Britain-United States Agreement. Dec. 4, 1942. 72.
- Maritime Law. Redefined by Montevideo Treaty on International Commercial Navigation Law. March 19, 1940. 109.
- Marriage. Recognition of contracts under international law. Montevideo Treaty on Civil Law. March 19, 1940. 144.
- Mexico. Regulations relating to claims before American Mexican Commission. May 18, 1943. 192.
- Mexico-United States. Exchange of Notes regarding military service of nationals. Jan. 22, 1943. 89.
- Montevideo Congress:
 - Exercise of Liberal Professions. Convention. Aug. 4, 1939. 107.
 - Intellectual Property. Treaty. Aug. 4, 1939. 103.
 - International Civil Law. Treaty. March 19, 1940. 141.
 - International Commercial Navigation Law. Treaty. March 19, 1940. 109.
 - International Commercial Terrestrial Law. Treaty. March 19, 1940. 132.
 - International Penal Law. Treaty. March 19, 1940. 122.
 - International Procedural Law. Treaty. March 19, 1940. 116.
 - Of 1888-89, described. 96.
 - Of 1939-40, described. 97.
 - Patents of Invention. Treaty. Jan. 16, 1889. 155.

- Political Asylum and Refuge. Treaty. Aug. 4, 1939. 99.
- Trade-Marks. Treaty concerning. Jan. 16, 1889. 152.
- Natural Resources, conservation of. Recommendations of United Nations Conference on Food. 178.
- Naval and air bases. Liberia-United States Defense Agreement. March 31, 1942. 86.
- Navigation. Restatement of private international law concerning. Montevideo Treaty. March 19, 1940. 109.
- Patents. Great Britain United States Agreement on interchange of rights, June 30, 1942, 1. International recognition of patent rights provided by Montevideo Treaty, Jan. 16, 1889. 55.
- Penal Law. Revised by Montevideo Congress. March 19, 1940. 122.
- Peru. Reservations under Montevideo Treaty on International Civil Law. March 19, 1940. 150.
- Price Control. Under agreement on international trade in wheat. April 22, 1942. 32.
- Private International Law. Treaties on (Montevideo). 95.
- Procedure. Montevideo Treaty on international procedural law. March 19, 1940. 116.
- Professions. Mutual recognition of status in. Defined by Montevideo Convention on Liberal Professions. Aug. 4, 1939. 107.
- Propaganda:
- in educational institutions. Resolution of Inter-American Conference of Police and Judicial Authorities. June 9, 1942. 78.
 - suppression of public demonstrations. Resolution of Inter-American Conference of Police and Judicial Authorities. June 9, 1942. 77.
 - commission of, by foreign agents. Foreign Agents Registration Act (United States). 50.
- jurisdiction (United States), Aug. 18, 1942. 90; United States. of jurisdiction, 92.
- Political Asylum and Refuge. Aug. 4, 1939. 99.
- International recognition provided by Montevideo Treaty. 152.
- Exchange of, in China. Great Britain-China Exchange of Notes. 48.
- Food and Agriculture. Final Act. June 3, 1943. 159.
- Act expending of former citizens serving with allied forces. April 2, 1942. 41.
- Conference on Food and Agriculture. June 3, 1943. 159.
- Foreign Agents Registration Act. April 29, 1942. 42.
- Law regarding disposition of prizes during present war. Aug. 18, 1942. 90.
- Memorandum of agreement on trade in wheat. April 22, 1942. 24.
- Neutrality Act of 1939, amended. Feb. 21, 1942. 93.
- Proclamation regarding Alien Enemies. Jan. 14, 1942. 54.
- United States-Mexico. Regulation of Claims Commission. May 19, 1943. 192.
- Uruguay. Reservations under Montevideo Treaty on International Civil Law. March 19, 1940. 150.
- War. Declarations of war by China, on Germany-Italy-Japan. Dec. 12, 1941. 1.
- Washington Wheat Meeting. Minutes of Final Session. April 22, 1942. 4.
- Wheat. Memorandum of agreement on international trade in. April 22, 1942. 24.